RESTRAINING THE STATE FROM EXCESSES: THE ROLE PLAYED BY THE LAW SOCIETY OF KENYA, 1920–2022

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DECLARATION AND RECOMMENDATION

Declaration

This thesis is my original work and has not been presented in this university or any other for award of a degree.

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DEDICATION

To Robert Nyamori Mugabe, ‘Baba Mudidi’, a soldier who nudged an army on the verge of defeat to victory.

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ABSTRACT

The 2010–2012 political revolutions in parts of the Middle East and North Africa also referred to as 'the Arab Spring' emerged into contemporary political history as a process in which ordinary citizens exerted decisive influence which brought down powerful governments. Studies on the impact of citizens' influence on governments have, however, mostly associated it with democratisation, where it is mostly reduced to electioneering processes. In Kenya, few studies have explored vertical accountability to explain how citizens work to restrain governments from actions that are against public interest. Using the Law Society of Kenya (LSK) as a representative of citizens' organisations, this study examined how citizens have endeavoured to restrain the Kenyan state from excesses. The study explored ways in which the LSK restrained the Kenyan state, the state's response to the LSK' endeavours, and the evolution of vertical accountability in the continued interaction between the LSK and the Kenyan state since the early 1920s when the institution was founded. The study used data from various sources. These included archival data covering the colonial, Jomo Kenyatta and Moi eras, sourced from the Kenya National Archives (KNA) in Nairobi; direct interviews with target informants; information from sources such as television and YouTube documentaries; theses and dissertations; commission reports; conference papers; journal articles and book chapters; books; internet sources; and magazines and newspapers. Data analysis commenced with transcription of data obtained via interviews and categorisation of all the obtained data in line with the study objectives. Data analysis entailed authentication of sources through external criticism and validation of the accuracy of the information through internal criticism. The data was then interpreted using documentary review, content analysis and theoretical reflections. The findings of the study constituted LSK's responses to government excesses on the one hand, and government's reactions to the LSK endeavours through the five administrations since the early 1920s. These findings were interpreted using the postcolonial governmentalities theoretical framework. The framework provided insights for explaining the actions of of the Kenya Government, the relationship between government and the Kenyan society, and illegal government responses to societal restraints. The study contributes to Kenya's historiography in general and to the country's legal history in particular.

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LIST OF ABBREVIATIONS AND ACRONYMS

ABA	African Bar Association
ACECA	Anti-Corruption and Economic Crimes Act
ACK	Anglican Church of Kenya
ACPU	Anti-Corruption Police Unit
ADC	African District Council
AEMO	African Elected Members Organisation
AfriBA	African Regional Forum of the International Bar Association
AfriCog	African Centre for Governance
AIC	African Inland Church
AIPCA	African Independent Pentecostal Church of Africa
AG	Attorney-General
AGM	Annual General Meeting
AU	African Union
BBI	Building Bridges Initiative
CAJ	Commission for Administrative Justice
CBA	Collective Bargaining Agreement
CBD	Central Business District
CBK	Central Bank of Kenya
CCA	Control of Corruption Act
CDF	Constituency Development Fund
CEMO	Constituency Elected Members Organisation
CEO	Chief Executive Officer
CIC	Constitution Implementation Commission
CID	Criminal Investigations Department
CIPEV	Commission of Inquiry on Post-Election Violence
CIPK	Council of Imams and Preachers of Kenya
CITAM	Christ Is The Answer Ministries
CGD	Centre for Governance and Development
CKRA	Constitution of Kenya Review Act
CKRC	Constitution of Kenya Review Commission
CLA	Commonwealth Lawyers' Association

CLARION	Centre for Law and Research International
CoE	Committee of Experts
CoG	Council of Governors
CORD	Coalition for Reforms and Development
COTU	Central Organisation of Trade Unions
CPK	Church of the Province of Kenya
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
CSO	Civil Society Organisation
CS	Civil Society
DC	District Commissioner
DCI	Directorate of Criminal Investigations
DO	District Officer
DP	Democratic Party
DPP	Directorate of Public Prosecutions
DYM	*Dini Ya Musambwa*
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
EALA	East African Lawyers' Association
EBS	Elder of the Order of the Burning Spear
ECK	Electoral Commission of Kenya
EFK	Evangelical Fellowship of Kenya
ExCo	Executive Committee
FBA	Family Bar Association
FBOs	Faith-based Organisations
FEM	February Eighteenth Movement
FIDA	*Federacion Internacional de Abogadas* (Federation of Women Lawyers)
FORD	Forum for Restoration of Democracy
GEMA	Gikuyu, Embu and Meru Association
GSU	General Service Unit
HNBA	Hispanic National Bar Association
IBA	International Bar Association
IBEAC	Imperial British East Africa Company

ICC	International Criminal Court
ICJK	International Commission of Jurists Kenya
ICT	Information Communication Technology
IEBC	Independent Electoral and Boundaries Commission
IGP	Inspector General of Police
ILO	International Labour Organisation
IMF	International Monetary Fund
IPPG	Inter-Parliamentary Parties Group
IPK	Islamic Party of Kenya
IPOA	Independent Police Oversight Authority
JKIA	Jomo Kenyatta International Airport
JSC	Judicial Service Commission
KACA	Kenya Anti-Corruption Authority
KADU	Kenya African Democratic Union
KANC	Kenya African National Congress
KANU	Kenya African National Union
KAU	Kenya African Union
KAWC	Kenya African Workers Congress
KBC	Kenya Broadcasting Corporation
KACC	Kenya Anti-Corruption Commission
KCCA	Kenya Corruption Control Authority
KEMRI	Kenya Medical Research Institute
KENAO	Kenya National Audit Office
KFL	Kenya Federation of Labour
KICC	Kenyatta International Conference Centre
KIM	Kenya Independence Movement
KHRC	Kenya Human Rights Commission
KMA	Kenya Medical Association
KNA	Kenya National Archives
KNCHR	Kenya National Commission on Human Rights
KNP	Kenya National Party
KNUT	Kenya National Union of Teachers
KPA	Kenya Ports Authority

KP&TC Kenya Posts and Telecommunications Corporation

KPU Kenya Peoples Union

KUPPET Kenya Union of Post-Primary Teachers

KRA Kenya Revenue Authority

KSL Kenya School of Law

KTMT Kenya Times Media Trust

KTN Kenya Television Network

LegCo Legislative Council

LDP Liberal Democratic Party

LNCs Local Native Councils

LSK Law Society of Kenya

LTUEA Labour Trade Union of East Africa

LTUK Labour Trade Union of Kenya

MAT Multi-Agency Team

MBO Membership-based Organisation

MoU Memorandum of Understanding

MP Member of Parliament

MUHURI Muslims for Human Rights

MWAKENYA *Muungano Wa Wazalendo Wa Kuikomboa Kenya* (Union of Patriots for Liberating Kenya)

NAK National Alliance Party of Kenya

NAMLEF National Muslim Leaders Forum

NARC National Alliance Rainbow Coalition

NASA National Super Alliance

NCCK National Council of Churches of Kenya

NCIC National Cohesion and Integration Commission

NCPB National Cereals and Produce Board

NDAC Nairobi District African Congress

NFD Northern Frontier District

NGAO National Government Administrative Officers

NGEC National Gender and Equality Commission

NGO Non-Governmental Organisation

NIS National Intelligence Service

NKP	New Kenya Party
NLC	National Land Commission
NMG	Nation Media Group
NMS	Nairobi Metropolitan Service
NPS	National Police Service
NPSC	National Police Service Commission
NSIS	National Security Intelligence Service
NSSF	National Social Security Fund
NYS	National Youth Service
ODM	Orange Democratic Movement
PAC	Public Accounts Committee
PANA	Pan African Lawyers Association
PBO	Public Benefit Organisations
PC	Provincial Commissioner
PCEA	Presbyterian Church of East Africa
PCP	People's Convention Party
PEV	Post-Election Violence
PIC	Public Investments Committee
PILIL	Public Interest Law Institute Limited
POEA	Public Officer Ethics Act
PNU	Party of National Unity
PS	Permanent Secretary
PSC	Public Service Commission
PUSETU-K	Public Service Trade Unions of Kenya
RPP	Release Political Prisoners
SDP	Social Democratic Party
SADCLA	Southern African Development Community Lawyers Association
SAPs	Structural Adjustment Programs
SCORK	Supreme Court of the Republic of Kenya
SPK	*Shirikisho* Party of Kenya
SRC	Salaries and Remuneration Commission
SUPKEM	Supreme Council of Kenya Muslims
TJRC	Truth, Justice and Reconciliation Commission

TSC	Teachers Service Commission
TUC- K	Trade Union Congress of Kenya
UASU	Universities Academic Staff Union
UK	United Kingdom
UKP	United Kenya Party
UMA	United Muslims of Africa
UN	United Nations
VAT	Value-Added Tax
VOK	Voice of Kenya
WABA	West African Bar Association
WW I	World War I
WW I	World War II
YK'92	Youth for KANU 1992

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Restraining the state, which basically entails confining state operations within the rule of law, is considered one of the most important attributes of the state. Lack of restraint on the part of the state leads it to excesses, such as engaging in acts of corruption and extrajudicial killings.[1]

State restraint is categorized into four main streams. First is self-restraint, which comes through 'horizontal accountability,' and which refers to 'checks and balances' among the three arms of government. The second form of state restraint is through diagonal accountability. This entails social institutions and organisations such as churches and other faith-based institutions, Non-Governmental Organisations (NGOs) and trade unions among others representing the wider society getting involved in the operations of checks and balances institutions. The third form of state restraint is by external players such as supra-national entities, inter-governmental bodies and bilateral and multilateral partners.

The final form of state restraint comes from the actions of the wider organized society, which is cast as being in a 'vertical' relationship with the state. It is called vertical accountability and involves having the state restrained by citizens, jointly or separately, whether through elections and other formal processes, or through associational events such as mass mobilization.[2] It is this last form of restraint which was the focus of this study.

Academic interest in vertical accountability is growing, especially in the aftermath of the 'Arab Spring,' which started in Tunisia in December 2010. The phenomenon entailed civilians from different socio-economic and political backgrounds massing in the streets and public squares to demand for fundamental reforms in powerful, entrenched regimes, including the resignation of powerful regime figureheads. The phenomenon extended beyond Tunisia and spread to much of the Arab world, leading to the collapse of long-standing, entrenched regimes, among them those of Tunisia's Ben Ali, Egypt's Hosni Mubarak, Libya's Muamar Gaddafi, Algeria's Abdelaziz Bouteflika and Sudan's Omar Al-Bashir. The

[1] F. Fukuyama, *Origins of Political Order* (London: Profile Books, 2011): 1–9.
[2] A. Schedler, 'Conceptualising Accountability', in *The Self-Restraining State, Power and Accountability in New Democracies* ed. A. Schelder, L. Diamond and M.F. Plattner (London: Lynne Rienner Publishers, 1999): 13–28.

revolution was also partly behind constitutional reforms in Morocco and Bahrain and civil wars in Syria and Yemen. The phenomenon was an important example of vertical accountability in action.[3]

In Kenya, since the establishment of the modern state on 1 July 1885, the country has witnessed numerous state excesses. Despite adopting various means for restraining the state, including a separation of powers among the executive, judiciary and parliament as well as the creation of other checks and balances institutions, Kenya has continued to witness state excesses. Historically, the executive was the earliest arm of government to be developed, hence making it enjoy unrestrained exercise of power prior to the establishment of other arms of government which could restrain it.[4]

In the colonial era, state excesses manifested themselves in numerous actions which the state took against Kenya's African population. These included punitive expeditions, destruction of the African economic initiative in favour of the white settler economy, silencing of the political voices of the African population, and destruction of African institutions and their replacement with hostile and alien versions of the same institutions, which the colonial state then used to control Africans. Other excesses involved discrimination in provision of public services to Africans as compared to settlers, despite the fact that Africans shouldered a heavier tax burden compared to the settler population.[5]

Kenya's postcolonial administrations perpetrated these excesses, having inherited the colonial state and its institutions upon independence in 1963. In particular, the administrations clamped down on civil liberties; perpetrated human rights violations; used public resources in a discriminatory manner; and engaged in economic crimes, including corruption and theft of public land.[6]

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[3] M. Beck and S. Hüser, 'Political Change in the Middle East: An Attempt to Analyse the "Arab Spring"', *Middle East Studies*, No. 203 (2012) 4–34; G. Kerr, *A Short History of the Middle East: From Ancient Empires to Islamic State* (Harpenden: Pocket Essentials, 2016), 173.

[4] B. Berman, *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (Nairobi, East frican Educational Publishers, London, James Currey, Athens, Ohio University Press, 1990), 210–226; T. Zeleza, 'The Establishment of Colonial Rule, 1905–1920', in *A Modern History of Kenya,* ed. W.R. Ochieng (Nairobi, Evans Brothers Kenya Limited, 1989), 35–39; G. Mwangi and F. Holmquist, 'Transparency without Accountability', *Economics Department Working Paper Series,* No. 127, University of Massachusetts, Amherst (2011): 7.

[5] Berman, *Control,* 226; R. Maxon, 'The Years of Revolutionary Advance, 1920–1929' in *A Modern History of Kenya,* 71–72; J. Lonsdale, 'The Conquest State, 1895–1904', Ibid, 9; T. Kanogo, 'Kenya and the Depression, 1929–1939', Ibid, 114; T. Zeleza, 'Establishment,' 35–39.

[6] Mwangi and Holmquist, 'Transparency', 7; A. Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya', *The Journal of Modern African Studies,* 50 (2012): 467–492.

Although there were attempts, particularly during the third postcolonial administration under Mwai Kibaki, to restore restraints through strengthening the judiciary via the means of a reform initiative popularly referred to as the 'radical surgery' and establishment of commissions of inquiry into economic crimes, these were disrupted, and the administration itself engaged in its own excesses. These included failing to implement the recommendations of the commissions of inquiry, engaging in corruption most notably the 2004 Anglo-leasing scandal, disrupting a constitution review process and presiding over the inconclusive 2007 general election, which led to a post-election crisis between late 2007 and early 2008.[7]

The post-election crisis resulted in a Grand Coalition Government led by Mwai Kibaki and Raila Odinga. The Grand Coalition Government restored both horizontal and vertical restraints on the state through a comprehensive review of the constitution in 2010. However, Kenya's fourth postcolonial president, Uhuru Kenyatta, engaged in a number of reversals of the 2010 constitutional provisions and undermined some of the restraints on the state which the new constitution had set up. Like the administrations before it, and in spite of the strong restraints provided in the 2010 constitution, the Uhuru Kenyatta administration engaged in excesses.[8]

In efforts to restrain the state in Kenya, commencing with the formation of the first Kenyan legislature in 1923, the introduction of the Independence Constitution in 1963, the restoration of multi-party democracy in 1990, change of governments through regular general elections since 1992, reform of the judiciary since 2003, deployment of numerous commissions of inquiry into government excesses and adoption of a new constitution for Kenya in 2010, it was expected that the LSK, as a vertical accountability actor, would make a significant contribution to these endeavours. This was due to two main reasons. First, since state excesses violate the rule of law, the LSK, as a major custodian of the rule of law alongside the judiciary, was naturally expected to actively express itself against those excesses. Secondly, and especially after 1949, the LSK received a statutory mandate to promote the

[7] G. Murunga and S.W. Nasong'o, *Kenya: The Struggle for Democracy* (Dakar: CODESRIA, 2007), 10; Republic of Kenya, *Report of the Commission of Inquiry into Illegal and Irregular Land Allocations*, Nairobi: Republic of Kenya [Government Printer], 2004; Manji, 'The Grabbed State', 468.

[8] Y. P. Ghai, 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution', in *Kenya: The Struggle for a New Constitutional Order,* ed. Godwin R. Murunga, Duncan Okello and Anders Sjogren (London: Zed Books, 2014), 127; E. A. Gimode, 'The Role of the Police in Kenya's Democratisation Process', Ibid, 227–262; Y. P. Ghai, 'The Attorneys-General: Upholders or Destroyers of Constitutionalism?' in *The Legal Profession and the New Constitutional Order in Kenya,* ed. Yash Pal Ghai and Jill Cottrell Ghai (Nairobi: Strathmore University Press, 2014), 144; 'Sliding into an Executive Dictatorship', *The Nairobi Law Monthly,* May 2018, 39; K. Mungai, 'End Time for Liberal Democracy?' *The Nairobi Law Monthly,* May 2018, 44.

rule of law. This therefore meant that it was legally expected to oppose any abuse of power by the state.

This study sought to examine LSK's contribution in restraining the Kenyan state since the institution's establishment around 1922. It also sought to explore how the state responded to LSK's efforts to restrain it, including what it did to weaken these endeavours. The study responded to two knowledge gaps, namely what the contribution of the LSK in restraining the state in Kenya from excesses was, and how the Kenyan state responded to attempts by the LSK to restrain it from excesses. In responding to these two knowledge gaps, the study provided a scholarly account of how vertical accountability operated in Kenya, giving an academic explanation for the interactions between the LSK and Kenyan governments in the evolution of the rule of law in the country.

1.2 Statement of the Problem

State - society relations in Kenya have evolved over time, with the state deploying violence, co-optation and cooperation as tools for initiating, entrenching, and perpetuating its dominance over society. In response, society has reacted in various ways to restrain the state from excesses. However, there have been few critical accounts on societal efforts at restraining the state in Kenya. The existing accounts on societal reaction to state domination have not only equated it to democratisation, but they have also treated the reaction in a generalised way, which does not account for the actions of specific stakeholders within the broader society. This study examined efforts at restraining the Kenyan state since 1922 in respect to the role played by the LSK. The study focused on societal reaction to the excesses of the state, particularly the endeavours by the LSK to restrain the Kenyan state since 1922.

1.3 Objectives of the Study

The general objective of this study was to examine efforts made by the LSK to restrain governments in Kenya from excesses since the organisation's establishment in early 1920s. The specific objectives were to examine:

i. The emergence of the LSK and its interaction with the colonial administration up to 1963.

ii. The relationship the LSK had with the Jomo Kenyatta government between 1963 and 1978.

iii. The interaction between the LSK and the Moi administration from 1978 to 2002.

iv. The evolution of the LSK in the post-Moi era up to 2022.

1.4 Research Questions

The main research question was: how successful was the LSK in restraining governments in Kenya over the years? The specific research questions were:

i. To what extent was the LSK able to restrain the colonial administration from excesses, and how did the administration react to the LSK endeavours?

ii. In what ways did the LSK restrain the Jomo Kenyatta administration from excesses, and how did the administration react to LSK's efforts?

iii. What measures did the LSK take to restrain the Daniel arap Moi government from excesses, and how did the government react to these measures?

iv. To what extent was the LSK able to restrain the administrations in the post-KANU era from excesses, and what were the reactions of these administrations to LSK's endeavours?

1.5 Significance of the Study

This study examined efforts at restraining the Kenyan state from the early 1920s to 2022 by interrogating the role played by societal groups, specifically the LSK. In doing so, it contributed to Kenyan historiography in two main ways. First, the study examined the evolution of state restraint in Kenya. Prior to this study, the broader area of state restraint had received little academic attention, whether through examination of checks and balances under horizontal accountability, or via vertical accountability emerging from the actions of organised groups. Most existing accounts on state restraint in Kenya merge it with reform of the state, which came either with decolonisation, independence, democratisation or constitutional review. As such, there existed a knowledge gap concerning efforts at restraining the state from excesses. This study has contributed towards filling this gap by examining the evolution of vertical accountability in Kenya through establishing the role the LSK has played in the development of this type of state restraint.

Secondly, the study has contributed to the historical study of the LSK. Although accounts on the LSK exist, there has been no academic study on how the LSK acted as a vertical accountability actor to restrain the state from excesses. This study has analysed LSK's role as a vertical accountability actor in restraining the state from excesses.

1.6 Scope and Limitations of the Study

The study examined how organised society, exemplified by the actions of the LSK, has contributed to restraining the Kenyan state. The LSK served as a case study, whereby findings from its reaction to state excesses were taken as representative of societal response to state excesses in Kenya. The use of the LSK as an example of the general societal reaction may not have been strictly accurate, but this was necessitated by the choice of the study period, which fell between early 1920s and the end of the Uhuru administration in late 2022. This period required a historical ex poste facto research methodology. This methodology in turn required societal groups with not only an existence that goes to the early 1920s, but also an archival record. In Kenya, only a few such societal groups exist, LSK being one of them.

Secondly, the study confined itself to the realm of state restraint emerging from actions of societal groups such as the LSK. Although conscious of other ways through which the state can be restrained, including horizontal accountability via checks and balances institutions and external accountability via supra-national institutions such as the IMF and the World Bank, the study did not consider these other mechanisms. Instead, it left them as possible areas for future research.

Thirdly, the study limited itself to investigating the LSK as an institution, rather than the broader legal profession that includes the judiciary and the state law office. It restricted itself specifically to the official activities and pronouncements of the LSK either contained in minutes of the organisation's meetings or issued by its chairperson and/or council. The study also confined itself to activities and pronouncements of the LSK that were directly challenging the state's position on the rule of law, rather than other mandates of the LSK established by law, including its own ethical practices and regulatory powers over the legal profession.

A significant limitation to the study was the difference in availability of data for various periods of the LSK history under examination. The earlier periods of the study did not have informants who interacted with the LSK, compared to later periods. This had the potential of

introducing an inherent data bias towards later periods of LSK's history, in which the Moi and post-Moi eras dominate available data on the LSK, compared to the colonial and Jomo periods. To overcome this limitation, the study made use of the available archival information on the colonial and Jomo periods rather than oral data. It also balanced between oral data and archival information, with oral data being more prominent in the Moi and post-Moi eras, while archival information was more prominent in the colonial and Jomo periods.

Additionally, being a study dealing with the concept of the rule of law, which only gained historical significance later on within the study period, there was the danger of anachronistic application of the term in the study. In the five administrations which have been subject of this study, only the last three could be said to have existed when the rule of law became a dominant mode of thought in governance. To overcome the problem of anachronism in the application of the term, the study situated the actions of the state within the historical context in which each particular administration existed.

1.7 Definition of Terms

The study used terms from the accountability, legal, governance and development fields. As such, working definitions for some of the concepts employed in the study was necessary. These are summarised as follows:

Civil Society: Used interchangeably with organised society, it means organisations emerging from the broader society that are independent of both the state and profitable pursuits and are concerned with advancing their members' welfare and that of the wider society. Such organisations include trade unions, faith-based organisations such as Muslims for Human Rights (MUHURI), the Supreme Council of Kenya Muslims (SUPKEM) and the NCCK and NGOs and professional institutions such as the LSK. It should be noted, however, that LSK's identity is not solely that of a CSO. Based on the law establishing it, the organisation is a statutory body within Kenya, with regulatory power over the country's legal profession. On the other hand, on account of receiving subscriptions from members and acting to promote their welfare, as well as the interests of the general public, the LSK is a CSO.

Horizontal accountability: This is one of the forms of restraining the state. The commonly applied term for horizontal accountability is checks-and-balance in government. In this study, horizontal accountability refers to formal mechanisms that are set up by law and funded by

the state to restrict the actions of the executive and other arms of government to the laid down laws. Examples of these mechanisms include the judiciary and the legislature.[9]

Rule of law: This applies to a situation where both citizens of a country and the actions of their government are governed by law.[10] The concept of rule of law entails adherence to several cardinal principles.[11] The three most relevant for this study consist of first, the principle of the existence of rules to which everyone is subject. This principle is manifested in the existence of a constitution, within which is contained a Bill of Rights whose main role is to protect individuals from arbitrary actions of the state. The second principle is manifested in a system of checks-and-balance institutions. The institutions relate to each other horizontally and this provides them with separate but equal and independent powers and responsibilities. These powers and responsibilities in turn enable them to check on each other. The third principle entails respect for due process in which only competent and independent courts of law through a thorough and transparent procedure determine sanctions for any transgressions of the law by individuals and state entities.[12]

State: In this study, the state is synonymous with the executive arm of government. Given the prominence and dominance of the executive in relation to the other arms of the state, it is the most visible manifestation of the state. As such, reference to the state in this study, unless stated, implies the executive arm.

State actors: These consist of agents of the executive arm of government, especially those charged with advancing the legal and security interests of this arm. As used in this study, they mainly constitute government lawyers such as the Attorney General, the Director of Public Prosecution as well as two main security organs, namely the police and the intelligence services.

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[9] Schelder et al. *The Self-Restraining State*,13-28.

[10] Anne Muthoni Ndung'u, 'The State of the Judiciary and the Rule of Law since 2002', *Rule of Law Report* (2005), 1.

[11] There are numerous accounts of what constitutes the principles of the rule of law. This study has settled for the account provided by A. V. Dicey, considered the father of rule of law, as the most relevant for the study. The reason for the choice of Dicey's principles over the rest is because his principles are mostly focused on the relationship between the state and society, which is the focus of this study.

[12] W. B. Harvey, 'The Rule of Law in Historical Perspective', in *An Introduction to the Legal System in East Africa,* ed. W. B. Harvey (Nairobi, Kenya Literature Bureau, 1975), 210–214; H. F. Morris, *Crime in East Africa 3: Some Perspectives of East African Legal History.* Uppsala: The Scandinavian Institute of African Studies, 1970, 13.

State excesses: These are actions of the executive arm of government, which are outside the provisions of the law. Such actions include extra-judicial killings, engaging in corruption and generally acting without regard to the existing law. Although the judiciary and the legislature may have equally engaged in excesses, such excesses are outside the purview of this study, unless they are directly instigated by the executive arm.

State restraint: As used in this study, state restraint involves the process of confining the actions of the executive arm of government to what is provided for by the law. The actions include suing the executive arm of government in court when it breaches the law. They also include openly opposing the actions or intentions of the executive arm of government which breach the law. State restraint should, however, not be equated to state resistance. Whereas resistance against the state may extend to cover activities like armed rebellion, state restraint, on the other hand, is confined to challenging the state using legal, administrative, moral, and political processes when it breaches the law.

Vertical accountability: This is another form of restraining the state. In contrast to horizontal accountability, vertical accountability comes from the actions of actors less powerful than the state, broadly referred to as civil society. Examples of vertical accountability include protests by members of the public in order to force the executive arm of government to reverse actions or intentions considered harmful to society or in breach of the law or other societal norms.

1.8 Literature Review and Theoretical Framework

The subjects of state excesses and the LSK have separately received varied academic attention from numerous authors. However, few authors have written on these two subjects as the combined focus of study. As such, most existing accounts on state excesses and the LSK are scattered in different studies from numerous authors, each touching on one or the other aspect of the subjects.

To effectively extract information of relevance to this study, the literature review was thus not centred on individual authors. Instead, it was organised into broad spheres and categories aimed at making it provide existing details and gaps in the study of LSK's role in restraining the state. For instance, the literature on state excesses is broadly organised into the three spheres of political, economic, and social excesses. The literature on the LSK, on the other hand, is broadly organised into three categories. These are what has been written about, first,

the origin and meaning of law and the rule of law; secondly, the role of the legal profession, including normative issues and how the legal profession is organised across the world; and thirdly, the LSK and its evolution in Kenyan history. Whereas the first two categories are aimed at establishing the scope of LSK's role in restraining the state, based on existing definitions of the law, the rule of law and the norms which guide how bar associations are formed and organised in order to effectively discharge their functions, the third category is aimed at examining what different authors have written on how the LSK has acted in relation to this scope and norms. In this way, the third category examines what different authors have written about LSK's origins, structural organisation, interaction with other agencies, functions and efforts at restraining the state in Kenya.

The Kenyan state, both colonial and post-colonial, has engaged in numerous excesses. These have had political, economic and social ramifications for the country. For political excesses, these comprised of actions of the state which mainly violated the rights of Kenyans to political freedoms. Economic excesses, on the other hand, involved state actions which mainly destroyed the country's economy and led to impoverishment of ordinary Kenyans. As for social excesses, these comprised actions of the Kenyan state which disrupted social harmony among the country's ethnic and other social groups, leading to social breakdown, ethnic distrust and social unrest.

Berman, Maxon, Lonsdale and Elkins are among the authors who have written on the political excesses of the colonial state in Kenya. These ranged in detail, but their collective effect was to suppress the rights of Kenya's African populations from expressing themselves and participating in the country's politics. Among the most pronounced political excesses included lack of political representation for Africans in government, criminalisation and suppression of African political voices, banning of African political formations such as the Kenya African Union (KAU) and limiting African access to information.

In addition, the colonial administration distorted traditional African institutions, diverting them to serve colonial interests. Although modern checks and balances institutions such as the Legislative Council (LegCo) were created in the colonial era, these did not help Africans put checks on the colonial government, given that they were confined to serving settler interests. For instance, in the 1945-46 election in which Africans could choose their representatives to the Local Native Councils (LNCs), the colonial government rigged the elections in favour of candidates they deemed pro-government. In clamping down on the Mau

Mau uprising from 1952, the colonial government used excessive force against mainly the Kikuyu population and prevented any accounting for the atrocities committed.[13]

In the postcolonial era, Musila, Oculi, Mungai and Mutunga note that the most notorious political excesses included political assassinations, suppression of the political opposition, limiting of freedom of expression for ordinary Kenyans especially under the Jomo and Moi administrations, disdain for checks and balances, disobedience of court orders and rigging of elections.[14]

Much like the political sphere, in the economic sphere, there were pronounced excesses of the colonial government against the African population as well. Berman, Maxon, Zeleza, Kanogo, Tarus and Oculi highlighted some of these excesses. They included forced extraction of labour from Africans to boost the settler economy, heavy taxation of Africans through hostile ordinances, restrictions of choice for African labourers through restriction of movement by instituting the kipande system, offering deplorable working conditions and poor salaries for Africans, unfair distribution of development services and infrastructure in favour of settlers and forcing Africans into conscription during the two world wars. Other excesses included transferring of land belonging to Africans to settlers through the Crown Lands and Native Reserves Ordinances of 1902 and 1908 respectively, encouragement of official corruption especially amongst colonial chiefs, frequent reduction of African livestock through destocking campaigns and stealing from Africans through currency manipulation.[15]

Postcolonial administrations extended these economic excesses. Oculi, Mwangi and Holmquist, Kibwana et al, and Manji highlight some of the postcolonial economic excesses. These included use of public resources as a tool for purchasing political loyalty rather than national economic transformation, misappropriation of public property, theft of public land

[13] Berman, *Control*; Maxon, 'Advance'; Lonsdale, 'Conquest'; C. Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London: Jonathan Cape, 2005), xiv.

[14] Grace A. Musila, 'Governmental Logics of an Assassin State', in *Introduction: Postcolonial Governmentalities,* ed. T. Teo and E. Wynne-Hughes (London and New York: Rowman and Littlefield International, 2020), 168; 'Sliding', *The Nairobi Law Monthly*; Mungai, 'End?'; W. Mutunga, 'Judiciary is at a Tipping Point in its Ambitious Reform Agenda', *The Nairobi Law Monthly,* May 2018, 48.

[15] Berman, *Control*; Maxon, 'Advance'; Zeleza, 'Establishment'; Kanogo, 'Kenya'; Mwangi and Holmquist, 'Transparency', 7; T. Zeleza, 'Kenya and the Second World War, 1939–1950' in *A Modern History of Kenya,* 168; Isaac K. Tarus, 2004, *A History of the Direct Taxation of the African People of Kenya,* 1895–1973, PhD diss., Rhodes University.

and adoption of the Structural Adjustment Programs (SAPs) which impoverished Kenyans across the country.[16]

In the social sphere, state excesses caused social disharmony along racial, ethnic and geographical lines. The excesses either pitted communities against each other or manifested themselves in terms of racial and ethno-geographic inequalities. Berman and Zeleza for instance, show that the colonial administration tolerated income inequalities between indigenous Africans and the non-African races. It also perpetrated ethnic mistrust by using stereotypes to govern and determine the opportunities for different African ethnic groups. Further, the administration ignited ethno-geographic inequalities by perpetrating differences in access to services in different regions of Kenya. Overall, the colonial administration presided over the disruption of African social life, thus causing much of the social disharmony emerging out of the colonial period.[17]

In the postcolonial era, Oculi explains how the Jomo Kenyatta administration used a traditional Kikuyu oathing ceremony to mobilise the Kikuyu ethnic group as defence against accusations of assassinating former cabinet minister Tom Mboya. This increased ethnic tensions in the country, pitting the Kikuyu against the Luo. In addition, the Kenyatta government disproportionately distributed economic resources to the Kikuyu, Embu and Meru elite, thus perpetrating ethno-geographic inequalities across the country.

When Moi ascended to power in 1978, he continued the same trend, concentrating much of the state's resources among the Kalenjin elite. In the election of 1992 held after Kenya re-introduced multiparty politics, the country witnessed ethnic cleansing, in which tribes supportive of the opposition were evicted from perceived strongholds of the ruling party KANU. This trend continued in subsequent elections and reached its height in the post-election violence of 2007/08 when Kenyan communities fought along ethnic lines over the disputed elections of late 2007.[18]

The literature on state excesses indicates that African populations reacted against these excesses. However, except for brief accounts during the Moi era, the bulk of the literature has

[16] O. Oculi, 'The Role of Economic Aspiration in Elections in Kenya', *CODESRIA Africa Development, Vol. XXXVI, No 1* (2011): 13–28; Mwangi and Holmquist, 'Transparency', 7; Manji, 'The Grabbed State', *The Journal of Modern African Studies,* 468; K. Kibwana, S. Wanjala and O. Owiti (eds), *The Anatomy of Corruption in Kenya* (Nairobi, Centre for Law Research International, 2006).
[17] Berman, *Control;* Zeleza, 'Second World War', 168.
[18] Oculi, 'The Role', *CODESRIA Africa Development,* 13–28.

no mention of the LSK and the role it may have played as part of the entities which engaged in restraining government from excesses. The participation of the LSK in reacting to these excesses remains a gap in the literature on the excesses of the Kenyan state.

This is so, even as the LSK, based on the law establishing it, is expected to actively discourage the state from excesses. The organisation is a statutory body set up under the Law Society of Kenya Act, Section 4 (Cap. 18) to promote the rule of law in the country.[19] Its origin can be traced to 1911, with the formation of the Mombasa Law Society. However, it should be noted that although the Mombasa Law Society was formed as early as 1911, legal recognition of any bar association in Kenya had to wait until the enactment of the LSK Act in 1949.

Prior to the Act, the legal profession in the country was regulated by Kenya's High Court. The High Court was initially based in Mombasa, mostly because Mombasa was the colonial administrative headquarters at the time. With the shift in the headquarters from Mombasa to Nairobi in 1905, the Kenya High Court relocated to Nairobi. The 1905 relocation encouraged legal professionals based in Nairobi to form the Nairobi Law Society at around the same time.[20]

The Nairobi and Mombasa law societies merged in the early 1920s to form the LSK. The Mombasa Law Society remained in existence as a voluntary body. The Nairobi Law Society, on the other hand, took on a national outlook, with representatives from across the country, including those from the Mombasa Law Society. In 1949, the LSK was officially recognized through the Advocates Ordinance and the Law Society of Kenya Ordinance, both of 1949, making its membership mandatory. Currently, the membership is based on a subscription fee and shared professional identity, thus making it a membership-based organization and part of Civil Society in Kenya, which is one of its dual identities. [21]

The LSK is expected by Kenyan statutory law to promote the rule of law. As a concept, rule of law has been examined by Harvey. Starting with law itself, Harvey defines it as a rule which guides a person or an entity in performing certain actions and refraining from performing other actions. He argues that law comes both from nature and man's rational

[19] Ben Sihanya, Oral Interview, 24/10/2021.
[20] Jackson, 'The Law Society of Kenya', in *An Introduction to the Legal System in East Africa*, ed. W.B. Harvey (Nairobi, Kenya Literature Bureau, 1975), 102.
[21] Harvey, 'The Rule of Law', 210–214.

inclination. It is also both universally applicable and aimed at preserving human life and the common good. On the other hand, the rule of law, in particular as argued by Harvey, entails the ideas that, first no one can be punished, unless so determined by a court of law; secondly, all people are subject to the laws of the land; and thirdly, the bill of rights enjoys supremacy. Harvey further argues that rule of law mostly targets government due to the immense powers which the government wields, demanding that all its actions be bound by rules which are fixed and announced beforehand.

Harvey locates the origin of rule of law in Western historiography, tracing it to classical Greece. Within this stream of historiography, philosophers such as Aristotle and Plato raised basic questions regarding the authority of the state and its limits. These philosophers favoured rule of law over the rule of men, seeing in it a consistency which could better promote justice than rule of men. Their philosophic arguments laid a foundation for the rule of law, which encouraged the emergence of a class of legal specialists called juriconsults.

Under Roman influence, this nascent legal culture from the Greeks was further advanced through the works of philosophers such as Cicero as well as the actions of the Roman society in pursuits related to justice. In the medieval era, which followed the collapse of the Roman Empire, Christian theologians such as St. Thomas Aquinas justified the existence of law based on differences between the divine and secular orders. Christian influence on rule of law waned, however, with the growth of nationalism, which undermined the notion of a universal standard of justice provided by God. Instead, emerging nations came up with their own standards of the rule of law, thus rendering earlier postulations by Christian theologians of universal justice based on a divine order irrelevant.

During the Renaissance, philosophers, most notably Thomas Hobbes, came up with theories which shaped rule of law within the framework of territorial sovereignty. Under this framework, the role of maintaining justice was invested in national governments, without which life would be solitary, poor, nasty, brutish, and short.

Building on foundations laid by Renaissance philosophers, Enlightenment theorists such as A.V. Dicey explained the rule of law based on development of political institutions such as parliament in the UK and on three emergent ideas during the period. These ideas were, first, that any punishment to individuals can only be determined by a competent court of law; secondly, that all people were subject to the same laws; and, thirdly, that the Bill of Rights is

sacrosanct in the relationship between the state and its subjects. According to Morris, these ideas were transplanted to the non-Western world through colonisation.[22]

Turning to normative issues in the legal profession, the review here examines what is normally expected of lawyers in society. This is important in establishing the role expected of the LSK. In this regard, important authors are Ghai and McAuslan as well as Thode et al, who argue that lawyers are critical in restraining the state. The authors identify four roles for lawyers in society. These are promotion of human rights, peaceful resolution of social friction through use of law, mediating between oppressors and the oppressed in society and promoting respect for the law.[23] For Kenya in particular, Ghai argues that the country requires two types of lawyers. Whereas the first type would be concerned with the day-to-day administration of justice, the second type would concentrate on development and how to deploy the legal system for this purpose.[24]

An important norm in the legal profession is the organisation of the profession around bar associations. A review of literature on how the legal profession is organised establishes bar associations as the universal norm. Authors who have written on this include Porter, Oko, Osasona, Manteaw, Morris, Dauphinais and Beqiraj and McNamara. According to these authors, existing associations of lawyers are organised either geographically or in terms of professional specialisation. On professional specialisation, the authors identify several bar associations which bring together lawyers with a specific professional focus. Examples here include the Commonwealth Lawyers' Association (CLA), the Hispanic National Bar Association in the US, the Indigenous Bar Association in Canada, and the Family Bar Association in the UK.[25] In Kenya, an example of a bar association with a professional focus is the Federation for Women Lawyers (FIDA).

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[22] Harvey, Ibid; Morris, *Perspectives*, 13.

[23] Y. P. Ghai and P. McAuslan, 'Public Law and Political Change in Kenya', in *An Introduction to the Legal System in East Africa*, 84; Thode, Lebowitz and Mazor, 'A Modern Philosophy of Legal Education, Introduction to the Study of Law', in *An Introduction to the Legal System in East Africa*, 11.

[24] Y. P. Ghai, 'Goals of African Legal Education: A Comment', in *An Introduction to the Legal System in East Africa,* 31.

[25] J. Porter, 'The Effectiveness of Bar Associations in Conflict and Crisis', Lawyers, Conflict and Transition Project, Economic and Social Research Council, 2016, https://lawyersconflictandtransition.org/themainevent/wp-content/uploads/2014/07/THE-EFFECTIVENESS-OF-BAR-ASSOCIATIONS-IN-CONFLICT-AND-CRISIS.pdf (accessed 12/06/2018); J Beqiraj and L McNamara, 'International Access to Justice: Barriers and Solutions', *Bingham Centre for the Rule of Law Report*, International Bar Association (2014): 5; O. Oko, 'The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law', *Fordham Law Review* 77 (2009): 1295-1297; T. Osasona, 'African National Bar Associations and the Promotion of International Criminal Justice in Africa', A Contrario International Criminal

Geographically, there are bar associations at the global, continental, regional and national levels. At the global level, one such organisation is the International Bar Association (IBA). Within Africa, organisation of bar associations is categorised into three groups, namely, continent-wide bodies, regional bodies and national bodies. At the continental level, Osasona identifies three continent-wide bar associations. These are the African Bar Association (ABA), the Pan African Lawyers Association (PANA) and the African Regional Forum of the International Bar Association (AfriBA).[26]

Of these continent-wide bar associations, the LSK was active in the formation of the ABA in August 1971 in Nairobi, with LSK chairman at the time, Sam Waruhiu, becoming its first secretary general. The major objective of ABA at the time of its formation was to promote the rule of law in Africa and in its very first act against state excesses, it condemned detention without trial as contrary to the rule of law.[27]

At the regional level, there exists the Southern African Development Community Lawyers Association (SADCLA), the West African Bar Association (WABA) and the East African Lawyers Association (EALA). Both at the continental and regional levels, these associations draw membership from individual lawyers and from bar associations within their respective regions.[28]

At the national level, two of the most significant national bar associations which have influenced similar bar associations in Africa are the English Bar Association and the American Bar Association. Indeed, the LSK is modelled mostly along the lines of the English Bar Association. The American Bar Association provides an example of how a bar association can engage with legislative and other governmental bodies to push for public and professional interests.[29]

Following examples from the West, each country in Africa has a national bar association. However, the founding dates of these associations differ from country to country. Manteaw

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Law, https://acontrarioicl.com/2014/10/17/african-national-bar-associations-and-the-promotion-of-international-criminal-justice-in-africa/ (accessed on 03/06/2019); S. O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need', *McGeorge Law Review* 39, 4/1 (2016): 913; Morris, *Perspectives*, 13; K. A. Dauphinais, 'Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills - Pedagogy for a Sustainable Rule of Law Revival in East Africa', *North Dakota Law Review* 85 (2009): 53.

[26] Osasona, 'Associations'.

[27] Harvey, *Introduction,* 111.

[28] Osasona, 'Associations'.

[29] Harvey, *Introduction*, 81–83.

argues that the first national bar associations in Africa were set up in the Gold Coast (present-day Ghana) in 1853 and in Lagos County (Nigeria) in 1862. The modern Nigerian Bar Association was, however, formed in 1933. In South Africa, the Association of Law Societies of the Republic of South Africa was founded in 1938. It was the precursor to the current Law Society of South Africa. Among the youngest bar associations in Africa is the Zimbabwe Law Society, which was instituted in 1981.[30]

Once formed, bar associations are expected to perform certain functions relating to the promotion of the rule of law. Roznai, for instance, cites examples from major revolutions in Western history among them the English Glorious Revolution (1688-89), the American War of Independence (1775-1783), the French Revolution (1789-1799) and the 'Arab Spring' (since 2010) to establish the roles played by bar associations. He concludes that whether in hindering or advancing revolutionary change, bar associations have a role to play in shaping state actions.[31]

Porter, on the other hand, dismisses the possibility of establishing universally agreed roles for bar associations. He cites the huge diversity of operational contexts in which bar associations find themselves, along with the different interpretations of the concept of rule of law as reasons for lack of a universal agreement on the role of bar associations in state restraint. This is, however, countered by both Oko and Ososina, who identify several roles emerging out of the work of the 54 national bar associations spread across Africa. Acknowledging that these bar associations face numerous contextual challenges, among them the fragility of African states, weak and distrusted judiciaries, an immature rule of law culture, and the absence of civil society, the authors argue that the bar associations nevertheless seek democratic consolidation, promote human rights, and play an active role against state excesses.[32]

Osasona further argues that due to their status, visibility, political clout, skills and training, bar associations are among the most effective agents against state excesses in Africa. The author cites different activities of bar associations that have led to state restraint, among them the fight against homophobic laws in Uganda, indictment of the Burundi government for persecuting the president of the Burundi Bar Association, opposition to interference with

[30] Manteaw, 'Legal Education', *McGeorge Law Review*, 913.
[31] Y. Roznai, 'Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles during a Democratic Revolution', *Journal of the Law Department of the London School of Economics and Political Science* (2013): 365–369.
[32] Oko, 'The Lawyer's Role', *Fordham Law Review*, 1295–1297; Osasona, 'Associations'.

prosecutorial independence in Sierra Leone and litigation against non-procedural appointment of supreme court judges in Ghana.[33]

Arguing in similar vein, Beqiraj and McNamara aver that bar associations which do not restrain states from violations in their own countries usually come under heavy criticism and fall into irrelevance. This has been the case, for instance, for bar associations in Cambodia, Israel, Latin America, South Africa, and Sierra Leone. In South Africa, the Law Society there was heavily criticised by the South African Truth and Reconciliation Commission for its silence during the apartheid era.[34]

In East Africa, Dauphinais indicates that lawyers have faced challenges in restraining the state similar to those of lawyers elsewhere in Africa. Although at independence there were high expectations that lawyers would promote the rule of law, this did not happen. Dauphinais cites several reasons for this, including an out-of-context legal education, the alienation of the profession from ordinary Africans, limited state funding, militarisation of politics especially in Uganda and diversion of the legal profession and its institutions into partisan ideological agendas.[35]

Within Kenya, the origin of the LSK is traced to 1911, in the early years of colonisation. Authors who have written on the legal profession and the LSK during the colonial era are Morris, Joireman, Nowrojee, Ghai and McAuslan as well as Ghai and Ghai. These authors disclose two main trends in the evolution of the legal profession under colonial rule. First, they indicate the colonial state's relationship with the non-indigenous elements of the legal profession. This was through regulating it, facilitating its formal self-organisation and self-regulation, and interacting with it. The second trend indicated by the authors is the colonial state's attitude and actions towards empowering indigenous Africans as legal practitioners.[36]

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[33] Osasona, 'Associations'.
[34] Beqiraj and McNamara, 'International Access', 23–24.
[35] Dauphinais, 'Training', *North Dakota Law Review*, 53.
[36] S. F. Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India', *Richmond School of Arts and Sciences Political Science Faculty Publications* 68 (2006): 14; P. Nowrojee, 'The Legal Profession 1963–2013: All This Can Happen Again – Soon', in *The Legal Profession and the New Constitutional Order in Kenya,* ed. Y. P. Ghai and J. C. Ghai (Nairobi: Strathmore University Press, 2014), 33–58; Y.P. 'Legal Profession: Themes and Issues', in *The Legal Profession and the New Constitutional Order in Kenya,* 24; P. M. Robert, *Peaceful Resistance: Advancing Human Rights and Civil Liberties* (Aldershot: Ashgate, 2006); W. Mutunga, 'A New Bench-Bar Relationship: The Vision of the 2010 Constitution of Kenya', in *The Legal Profession, and the New Constitutional Order in Kenya,* 63; Morris, *Perspectives*, 13.

The colonial period itself was characterised by transplantation of the British legal system into Kenya. Joireman explains that prior to European colonisation, most of Africa had Muslim and indigenous systems of law, the latter largely made up of unwritten customs. With colonisation, these two systems were pushed to the periphery of the African legal systems, while Western legal systems, in which lawyers organised around bar associations, became dominant.[37]

Ghai and McAuslan identify existence of lawyers in Kenya from as early as 1901. These early lawyers were mostly from England and India. Initially, they were subject to regulation by the Kenya Protectorate's Chief Justice and in some cases by the British Foreign Secretary. The legal profession was, however, not confined to only those with qualifications in legal training. The colonial government could, through the Protectorate Judge (a senior judge of the High Court), license anyone it deemed of good character and adequate capability to practice. The government also discouraged the early legal profession from organising itself into a bar association prior to and during the two World Wars. In the course of WWI, however, two voluntary organisations of lawyers emerged, namely the Mombasa Law Society based in Mombasa, and the Law Society based in Nairobi. They amalgamated in the early 1920s to form the Law Society of Kenya, which, however, remained unrecognised until 1949.[38]

The reforms of 1949 brought tremendous changes to the legal profession. The LSK Ordinance of that year established the Society as an incorporated body, with the responsibility of protecting the rule of law. It also gave to the LSK self-governing powers, providing that the organisation would be governed by a Council consisting of a president and six other persons elected at an annual general meeting. It also enhanced LSK's power to vet entrants into the legal profession. Further amendments to the 1949 Ordinance were carried out in 1952, 1957 and 1961 to consolidate LSK powers.

Ghai and McAuslan argue that the reforms led to both positive and negative effects on LSK's ability as a checks and balances institution. On the positive side, the reforms improved payment for legal services, enhanced the organisation's self-government and made membership of the organisation compulsory. In addition, its power as a members' welfare

[37] Joireman, 'Evolution', 14.
[38] Ghai and McAuslan, 'Public', 87.

pressure group was enhanced, since it now had the mandate to speak on behalf of all advocates across Kenya.

On the negative side, the reforms did not alter LSK's position as a non-indigenous African elite institution serving non-indigenous clientele. It remained aloof to indigenous African legal interests, leaving them to native tribunals, which had been established, through the Native Tribunals Ordinance of 1907. Secondly, the LSK ignored any reform of the native tribunals, staying away from reforms of the tribunals in 1930, 1933 and 1944 initiated by the Bushe and Phillips Commissions.

Thirdly, majority of LSK members were confined to Nairobi and Mombasa, and thus had no significant contact with the rest of the country. Fourth, the organisation showed little interest in legal aid for the poor, a majority of whom were indigenous Africans. In addition, despite the legal reforms and strengthening of LSK's position within the colonial governance architecture, Ghai, Ghai and McAuslan, Harvey, Shah and Nowrojee establish some continued ambivalence in the relationship between the LSK and the colonial government. The government never fully trusted the local legal community, and either used legal counsel from Britain or relied on administrators rather than legal practitioners in most of the decisions it made.[39]

A persistent question in the colonial era, especially its latter stages, was what to do with legal education for indigenous Africans. Morris, Dauphinais and Harvey identify three patterns which manifested themselves over this question. First, the colonial administration resisted the idea of training indigenous Africans as lawyers. According to Morris, the source of the hostility towards educating African lawyers stemmed from the experience which the British had had with the Indian nationalist elite after it had received British legal training. The colonial administration deduced that training Africans as lawyers would result in strengthening local decolonisation movements.

Secondly, when the colonial government allowed for legal training of Africans especially after the release of the Denning Committee report which recommended training indigenous African lawyers who would serve in future as state law officers, the content offered was irrelevant to local needs and the process of getting trained difficult. In terms of the content for

[39] Harvey, *Introduction*, 60; Ghai, 'Attorneys-General', 144; R. Shah, 'Politics of the law in Kenya: A Historical Perspective', *Pambazuka News*, 9 May 2011, 4; Nowrojee, 'Profession', 36; Ghai and McAuslan, 'Public', 86; Joireman, 'Evolution', 14.

African law students, Manteaw and Ghai indicate that the training which pioneer indigenous lawyers received was irrelevant to local needs. The training focused more on running state affairs and on private practice. In addition, indigenous lawyers trained in the UK were mostly barristers (lawyers who defend people in the law courts), whereas Kenya's largely peasant economy needed solicitors (lawyers who undertake legal work outside law courts). Overall, the curriculum the first indigenous lawyers received was not meant to help them promote the rule of law.

In terms of the process of getting trained as a lawyer, the colonial government had not set up local facilities for training lawyers. As such, law students from Kenya had to leave the country to go get trained outside the East African region. This was expensive and out of reach for most African students. It was not until 1961, the eve of the independence era that the University College Dar es Salaam University was set up as the first institution for training lawyers in the East African region. [40]

The third pattern which manifested itself had to do with the outcomes which emerged due to the colonial government's attitude towards indigenous African legal education. The first outcome was that at independence, there were fewer indigenous lawyers in the East African region compared to West Africa. Dauphinais calculates that by 1961, there were only 10 indigenous lawyers in Kenya, 20 in Uganda and only one in Tanzania, leaving the profession largely dominated by settlers from Britain and India. Secondly, having received a largely irrelevant legal education, indigenous lawyers found it difficult to engage in private practice, leaving this to British and Asian lawyers. They instead went into politics and government services. Thirdly, the lawyers adopted British mannerisms and aspired to be part of the ruling elite, rather than holding the government to account.[41]

Independence brought revolutionary changes in Kenya's governance, and these had an effect in the way the LSK evolved. The general governance environment after independence was characterised by the concentration of power in the executive, with the corresponding and deliberate diminishing of the role of both horizontal and vertical restraints on the successive postcolonial governments. As part of actors in the state restraint terrain, the LSK thus found

[40] Morris, *Perspectives*, 13; Harvey, *Introduction*, 61-65; Dauphinais, 'Training', *North Dakota Law Review*, 53.
[41] Harvey, *Introduction*, 63; Jackson, 'Society', 107; Ghai and McAuslan, 'Public', 92; Manteaw, 'Legal Education', *McGeorge Law Review*, 938.

itself in a restrictive environment where its role as a vertical accountability actor was discouraged by the executive.

Ghai, Nowrojee, Ghai and McAuslan, and Wanyoike are among the authors who have written on the LSK in the postcolonial era. Particularly under the administration of Jomo Kenyatta, the authors identify three patterns in the LSK-Government relationship. The first pattern consisted of significant weaknesses which the LSK faced during the Jomo era. These included factionalism in the organisation based on racial categories of indigenous and non-indigenous groups, continued domination of the organisation by non-indigenous groups, remoteness of the organisation from ordinary people and inadequate numbers of trained lawyers which could mount an effective challenge against government excesses.[42]

Each of these weaknesses affected LSK's ability to promote the rule of law. Existence of factions in the organisation meant divisions in terms of organisational vision, with the indigenous faction pre-disposed towards co-optation through the policy of Africanisation, while the non-indigenous faction preferred aloofness from local politics. Continued domination of the organisation by non-indigenous lawyers meant that it was largely viewed as a colonial entity which could not engage in local politics. Remoteness from ordinary Africans meant a difficult relationship with the general public, with most ordinary Kenyans having no sympathy or attachment to the organisation. Inadequate numbers of trained lawyers meant that the organisation's role in governance and development was minimal.

The Jomo administration exploited these weaknesses and reduced LSK's ability to hold it to account. It did this using three main tactics. First, it co-opted the indigenous faction of the LSK into government using the Africanisation policy by appointing members of this faction into important government positions. Secondly, it used the threat of nationalising the LSK under the pretext of providing legal aid across the entire country to maintain the aloofness of the non-indigenous faction of the LSK from local politics. Thirdly, the Jomo administration deployed its long-serving AG Charles Njonjo to tightly control the LSK and keep it away from challenging the administration.

As a result, the LSK remained silent in the face of excesses during the Jomo era. Three of the most egregious of these excesses were the banning of the political opposition led by former

[42] Ghai and McAuslan, 'Public', 86–101; Ghai, 'Goals', 36; Nowrojee, 'Profession', 34–36; Ghai, 'The Attorneys-General', 144; W. Wanyoike, 'The Director of Public Prosecutions and the Constitution: Inspiration, Challenges and Opportunities', in *The Legal Profession and the New Constitutional Order in Kenya*, 167–184.

Vice President Jaramogi Oginga Odinga, the amendment of the Independence Constitution to introduce draconian laws such as the Preservation of Public Security Act, which introduced detention without trial, and the assassination of cabinet Minister Tom Mboya in June 1969.[43]

Under the administration of Kenya's second president, Daniel arap Moi, the LSK had largely overcome internal factionalisation based on racial divisions. As a result of the development, the organisation had begun to pronounce itself on public interest issues. The relationship between the LSK and the Moi government commenced on a positive note, with the administration co-opting members of the organisation into government as indigenous judges. The Moi administration also enticed the LSK to the government's side by releasing Jomo-era political detainees.

The relationship between the LSK and the Moi administration soured, however, when the LSK begun to question some of the government's directives. The administration adopted punitive taxation measures, exploited weaknesses such as internal corruption and ethnic divisions in the organisation, and detained some lawyers while sending others into exile as a way of discouraging LSK from challenging it.[44]

In the post-Moi era, the LSK had matured into a highly visible public entity, with some of its members being well-known public figures at the forefront of championing the rule of law. The relationship between the LSK and the post-Moi administrations still had the earlier elements of co-optation and disagreements. Co-optation took place in the immediate aftermath of the 2002 election with the ascent to power of the Kibaki administration. The new administration appointed members of the LSK into influential government positions, the most notable being Kivutha Kibwana, Kiraitu Murungi and Martha Karua who became ministers. Although this was largely seen as rewarding the LSK members for the support which they had given the new administration in defeating the outgoing Moi administration, it nevertheless represented the co-optation of the LSK into the new administration.[45]

Disagreements between the Kibaki administration and the LSK emerged during the campaign for the 2005 draft constitution, in which the LSK chairperson at the time, Okong'o Omogeni, rejected the draft advanced by the government while sections of the LSK endorsed it.

[43] Ghai, 'Goals', 35; Joireman, 'The Evolution', 16; Wanyoike, 'Public Prosecutions', 167–184; Ghai and McAuslan, 'Public', 86–101.
[44] Robert, *Peaceful Resistance*; Ghai, 'Themes', 10.
[45] Ghai and Ghai (eds), *The Legal Profession,* 5.

However, this development not only indicated disagreements between the LSK and the Kibaki government, but also brought to the fore internal divisions within the LSK along political and ethnic lines.

The Kibaki administration's relationship with the LSK had a third dimension which had lacked in the earlier administrations. This was the element of cooperation. Cooperation between the two entities had existed prior to the formation of the Kibaki government, when the LSK campaigned alongside the political opposition, of which Kibaki was a prominent member, against the excesses of the Moi administration. With the formation of the Kibaki administration in late 2002, the cooperation continued. It heightened especially during the campaign for the 2010 Constitution of Kenya. During this process, the LSK, alongside other influential CSOs, among them the Kenya Human Rights Commission (KHRC) and the International Commission of Jurists Kenya (ICJK), the National Council of Christian Churches of Kenya (NCCK), the SUPKEM and MUHURI played a major role in developing content as well as in campaigning for the passage of the new constitution. After the enactment of the new constitution, the cooperation between government and the LSK was centred around the reconstitution and management of the judiciary. The 2010 constitution itself advanced the powers of the LSK further, placing its ability to restrain the state on a sound constitutional footing.[46]

From the existing literature, several ideas relevant to the study were identified. Literature on state excesses, for instance, documented the excesses of the Kenyan state and how these shaped the interaction the state had with the Kenyan society. Literature on the legal profession, on the other hand, provided the global, continental and regional context behind the evolution of the legal profession and its interaction with the state, as well as how the profession organised itself into bar associations and performed its normative roles in different contexts. This allowed for comparisons to be drawn between the status of the legal profession across the globe, and the evolution and performance of the LSK. For literature on the LSK, this collectively provided useful information indicating the importance of the Society in promoting the rule of law in Kenya, the interaction it has had with different actors within the governance sphere in Kenya and its evolution under different governments since the establishment of colonial rule in Kenya.

[46] Mutunga, 'Bench-Bar Relationship', 73.

Nonetheless, there were significant gaps in the literature. First, although the literature on state excesses indicated Kenyan societal reaction to state excesses, it did not mention the LSK. It indicated, for instance, that colonial state excesses drew protests from different quarters, among them humanitarian agencies in Britain, the political opposition in the British parliament, the International Labour Organisation (ILO) and the Anti-Slavery and Aborigines Protection Society. It also indicated the reaction of indigenous Africans themselves to colonial state excesses mostly through informal formations such as tribal institutions and nascent political groups. In addition, the authors confirmed the presence of other non-state actors such as the East African section of the London Chamber of Commerce, which were active in pushing for settler interests. They did not, however, mention the LSK, either as an actor in promoting settler interests or in protesting against colonial state excesses.[47]

Although literature on the postcolonial era state excesses mentioned the LSK as part of entities which reacted against the excesses, much of the information on LSK's reaction against state excesses was under the Moi administration, as opposed to administrations before and after the Moi era. Thus, there was no balance in the amount of information on the reaction of the LSK against state excesses through time, with the bulk of the literature on the organisation's reaction against state excesses heavily tilting towards the Moi era.

For literature on the normative roles of the legal profession, much of it identified the role of the profession under the general category of development, as opposed to specifically the promotion of the rule of law. Furthermore, it concentrated on aspects such as the training of legal practitioners rather than focusing on what the practitioners did with the skills gained from training, especially with regard to state restraint. The literature also took on the entire legal profession, rather than concentrate on lawyers organised in bar associations. Roznai, for instance, debated the contribution of the entire legal profession, rather than lawyers organised within bar associations, in analysing the contribution of lawyers in restraining the state. Although Ghai and Vanderlinden wrote on the importance of lawyers in promoting the rule of law, their works did not examine details of how particular entities, such as the LSK, reacted to curb state excesses.[48]

[47] Maxon, 'Advance', 77.
[48] Ghai, 'Goals', 33; Ghai, 'Themes', 10; P. Vanderlinden, 'The Goals of African Legal Education, Proceedings of the Conference on Legal Education in Africa', in *An Introduction to the Legal System in East Africa,* 16–24; Harvey, *Introduction,* 58.

As for the literature on the LSK, authors such as Ghai, Ghai and McAuslan, and Nowrojee offered valuable insights on LSK activities in response to state excesses. However, their accounts were plagued by at least four related weaknesses. First, the accounts were mostly generic with no specific instances to indicate the actions of specific LSK representatives and their actions when faced with state excesses. There were no statements or activities by LSK functionaries produced to reinforce the arguments of LSK actions and inactions.

Secondly, even within the few detailed accounts of LSK reaction to state excesses, these mostly centred on the colonial and Moi eras. There were no similar detailed accounts of the Jomo, Kibaki and Uhuru eras. As such, there was no continuous account of the LSK from its origins to present times. Furthermore, existing accounts were scattered in different book chapters and journal articles.

Thirdly, the existing accounts did not provide the full extent of the context of state behaviour that informed LSK's actions. Without this background, LSK actions were isolated from the temporal and spatial context which informed them. Fourth, the accounts did not establish the role of the LSK as a vertical accountability actor and as such, a major player in curbing state excesses. Hence, the accounts largely painted what the LSK was doing over the years in broad terms like democratisation rather than state restraint.

This study therefore researched on these knowledge gaps. For the gap on broad generic accounts of the LSK, this study adduced specific LSK actions from statements sourced from the archives, interviews and documentaries among other sources. On the gap of discontinuity in the LSK accounts, the study provided a continuous account of LSK activities in the face of state excesses from its formation in the early 1920s to the end of the Uhuru administration in late 2022. In addition, the study placed the account within a single format – the thesis. Furthermore, it provided elaborate content on state behaviour as the contextual background which informed LSK action or inaction. For the gap on the normative aspects of the legal profession, the study went beyond a generalised study of LSK's normative role as an actor in democratisation by examining its specific role as a vertical accountability actor and an active player in curbing state excesses.

In terms of the study's theoretical framework, this study was based on the poststructuralist tradition, particularly its derivative, the theory of postcolonial governmentalities. Before settling on the postcolonial governmentalities theory, the study considered the relevance of

each of the three most dominant intellectual traditions in the study of African political reality, namely the liberal, Marxist and poststructuralist intellectual traditions, along with their theoretical streams. For instance, the liberal tradition, along with its variant theories and sub-theories of modernisation and neo-liberalism, could explain the weak checks-and-balance systems in Kenya as being a result of state incapacity, which can be overcome through capacity-building initiatives modelled along examples from the West.

A major weakness of the tradition and its allied theories is that they are heavily teleological, framing the history of the African state in Eurocentric terms, by seeing the future of African states converging in the Weberian, rational-bureaucratic Western-style state. As such, they fail to appreciate the unique local context in which the African state operates, and the realities this context imposes on it. They thus fail to adequately explain why, even with many years of Western tutelage, African states and their checks-and-balance systems have failed to operate with the same level of efficiency as their counterparts in the West.

On the other hand, the Marxist tradition and the theories arising out of it can explain state actions, especially attitude towards the rule of law from an ideological perspective. They interpret the actions as either meant to entrench certain class privileges or undermine them. To the Marxist tradition and allied theories, the rule of law is not an end in itself, far beyond interrogation as it is taken by the liberal tradition. Instead, Marxists believe law is part of the ideologies of power which favours those into whose hands it falls.[49]

Under colonial rule in Kenya, for instance, the rule of law was in the hands of colonialists who used it to promote their interests against those of the African majority. African reaction to colonial rule through decolonisation was thus aimed at overthrowing this system along with its structures. The Kenyan postcolony, being non-Marxist, is a comprador state which advances the interests of a postcolonial elite and its foreign sponsors. Since the rule of law is not class neutral, it should thus be viewed with suspicion, especially if it does not promote the interests of the underclass.

A major weakness of the Marxist tradition and its derivative theories in relation to the rule of law is its lack of commitment to the concept. To the tradition, the rule of law being part of the elite superstructure for exploiting the socially excluded underclasses can be undermined for

[49] M. Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism', *Law and Social Inquiry* 15, no. 4 (1990): 633–634.

purposes of creating an egalitarian, classless society. Hence, state violation of the rule of law carried out in the name of creating a socialist egalitarian state is taken as a positive act. Thus, the Marxist tradition and its derivative theories do not pay serious attention to the concept of the rule of law. Instead, they treat it as an instrument in the service of class interests. It therefore cannot provide sufficient explanatory power for the evolution of the rule of law in Kenya, along with its accompanying apparatuses such as the LSK.[50]

The poststructuralist tradition and its derivative theories and paradigms (including postcolonial and post-development theories, Subaltern studies and theories of governmentality) explain the rule of law as both a source and outcome of relations of power. According to this tradition, power relations determine the condition of different entities, with powerful entities shaping the condition and actions of less powerful entities. A key instrument used in shaping the behaviour of the subservient entities in the power relation is law. Under the poststructuralist tradition, for instance, society, being in a subservient position to the state in terms of power, is shaped by the laws which the state imposes on it. The relationship between the state and society is, however, not entirely that of total power and total subservience. Instead, the two entities are locked in a mutual existence in which certain compromises are made on both sides of the power equation, including in shaping the law, which regulates the relationship between them.

The main reason for the choice of the poststructuralist tradition as the theoretical framework for the study was that the theory addressed itself to interrogating key legacies arising out of the Enlightenment. Given that the liberal and Marxist traditions are a legacy of the Enlightenment, they did not adequately address themselves to questioning this legacy (especially in Africa) as the poststructuralist tradition did. In addition, in combining postcolonial theory and theory of governmentality, the tradition achieves the conceptual ability to explain the continuous and unchanging nature of the state from the colonial to the postcolonial eras, while at the same time dealing with relations of power between the state and society, including how power is organised using the law to shape society, elicit reaction and set up compromises. All of this was relevant to the study.

Postcolonial governmentalities theory itself is an amalgam of postcolonial theory and theory of governmentality. Whereas the theory of governmentality is traced to the works of Michel

[50] Ibid.

Foucault, postcolonial theory is traced to the works of Edward Said. Whereas the theory of governmentality is concerned with arrangements which shape conduct and the justification used to set up such arrangements, postcolonial theory, on the other hand, focuses on interrogating continuities between the colonial and postcolonial systems. As an amalgamated conceptual framework, postcolonial governmentalities theory supplies a useful analytical tool for understanding conduct, the systems for regulating it and the justification behind those systems through different periods, be it in colonial or postcolonial times.[51]

Governmentality as first articulated by Foucault meant 'the conduct of conduct.' It has evolved into two ideas. First, it entails an activity meant to control the conduct of people. Under this meaning, it examines the lives of populations under the control of government and identifies the techniques, including use of rational methods such as statistics, with which government enforces compliance from the populations under its control.

Secondly, governmentality entails the whole ecosystem of knowledge which is used to not only justify the existence of regulations for controlling populations, but to also articulate those regulations. This ecosystem becomes responsible for making subjects of governmental power to self-govern in accordance with the regulations arising out of the ecosystem. To develop this ecosystem of knowledge, power builds a partnership with knowledge, giving rise to a power-knowledge configuration, from which power uses knowledge to not only justify the existence of regulations for controlling conduct, but to also articulate the expected conduct. On the other hand, knowledge gains from this relationship by being elevated into power.[52]

Foucault identified ways through which the idea of governmentality evolved. It first emerged under Greek philosophy as pastoral power, where the ruler's duty was comparable to that of a shepherd. Since the ruler could not possibly look after each of their subjects, medieval Christianity improved on this by inventing the idea of souls. According to Foucault, the idea helped in turning subjects into self-governing agents, and this reduced the need for the wielder of pastoral power to be physically present in order to govern subjects. Under Renaissance, Enlightenment and nationalist European government, pastoral power, with both

[51] P. Bowman, 'Conclusion: After Postcolonial Governmentalities', in *Postcolonial Governmentalities*, ed. T. A. Teo and E. Wynne-Hughes (London and New York, Rowman and Littlefield International, 2020), 241; T. A. Teo and E. Wynne-Hughes, eds., *Postcolonial Governmentalities* (London and New York, Rowman and Littlefield International, 2020), 4–6.

[52] Teo and Wynne-Hughes, *Governmentalities*, 4–6; B. Sokhi-Bulley, 'Governmentality: Notes on the Thought of Michel Foucault', *Queen's University Belfast Critical Legal Thinking* (2014): 1–5.

the idea of a ruler as someone who looks after subjects as well as subjects who self-govern in accordance with articulated standards of conduct, evolved into a secular form of power bringing together forms of individual self-control and mass population control that are at the centre of modern government.[53]

Under contemporary application, governmentality represents at least three ideas. First, it represents a complex form of power aimed at managing populations through use of conventional forms of power such as security institutions but also deployment of processes of rational knowledge such as analyses, statistics, data, calculations, and reflections. Secondly, governmentality is the process by which this form of power, in which ways of managing populations through rational means have become dominant across the world. Thirdly, governmentality is the process by which the modern state has assumed this form of power.[54]

As a theory which examines power, governmentality contributed three main insights on power which were relevant for this study. First, it states that power is dispersed rather than concentrated, and that it is neither absolutely dominant, leaving spaces for freedom within its various manifestations. Secondly, power draws reaction, which governmentality conceptualises as counter-conduct. As an analytical tool, counter-conduct is useful in understanding the various forms of reaction to power. Thirdly, governmentality adds new dimensions to the study of governmental power by putting less emphasis on conventional governmental control over territory, and more on how government focuses on controlling the lives of populations and individual subjects.[55]

However, in spite of the many possibilities of understanding power and governance which governmentality as a theory has brought into focus, it faces two main shortcomings. First, the theory fails to engage with the subject of colonial governmentality and the legacies it created, remaining silent on the effect of colonialism on the current state of governmentalities in formerly colonised worlds such as reasons used by former colonial states to justify their existence. Secondly, it is Eurocentric in its conceptualisation of governance and its manifestations, largely drawing on practices in the West, with scant reference to historical and continued development of governmental rule through postcolonial and imperial practices.

[53] Sokhi-Bulley, 'Foucault', 1–5.
[54] Ibid.
[55] Teo and Wynne-Hughes, *Governmentalities*, 4–20.

It is in responding to these two major shortcomings that governmentality is combined with postcolonial theory to constitute the postcolonial governmentalities theory. In combining the two theories, the amalgamated theory of postcolonial governmentalities is able to tap into the conceptual strengths of the two theories and overcome their major shortcomings. Whereas the governmentality theory helps explain how governmental power allied with rational knowledge have become dominant across the world, postcolonial theory, on the other hand, brings into focus practices of governmentality arising out of the interaction between the West and the colonised world.[56]

Postcolonial theory itself is understood as consisting of new ways of understanding colonialism and the legacies it left behind. Although the theory is traced to numerous possible origins and posits many different arguments, this study focuses on three that are most relevant to it. First, it addresses itself to the legacies of colonialism, to which many of the crises facing the postcolony are traced. Secondly, it offers a critique of local, postcolonial elites and structures of domination, exposing forms of control over populations through a type of power it calls biopower and a form of politics linked to violence it frames as necropolitics, both of which hand to wielders of power in Africa a destructive capability referred to as necropower. Thirdly, it brings attention to the dominated, offering an analysis of their domination, particularly through the concepts of hybridity, ambivalence and conviviality, through which it draws attention to their subjectivity, agency and creativity.[57]

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[56] Ibid, 21–24.

[57] K. Omeje, 'Debating Postcoloniality in Africa', In *The Crises of Postcoloniality in Africa,* ed. K. Omeje (Dakar: CODESRIA, 2015): 1–28; L. S. Rukundwa and A. G. van Aarde, 'The Formation of Postcolonial Theory', *University of Pretoria Department of New Testament Studies, (2*007): 11–71; S. Gikandi, 'Poststructuralism and Postcolonial Discourse', in *Introducing Postcolonial Studies,* ed. N. Lazarus (Cambridge University Press, 2004), 97–119; L. Burns and B. M. Kaiser, 'Forget Deleuze', in *Postcolonial Literatures and Deleuze: Colonial Pasts, Differential Futures,* ed. L. Burns and B. M. Kaiser (London: Palgrave Macmillan, 2012): 30; S. Osha, 'Theorizing the Postcolony or the Force of the Commandement: Meditations on Achille Mbembe's "On the Postcolony"'. *Quest,* XIV, no. 1–2 (2000): 113–122; P. Soyinka-Airewele, 'The End of Politics? Reclaiming Humanity in an Age of Biopower and Necropolitics', *Public Lecture Series* 4, no. 2 (2015): 5–26; R. Angela, 'Political and Cultural Identity in the Global Postcolony: Postcolonial Thinkers on the Racist Enlightenment and the Struggle for Humanity', *Acta Politologica* 9, no. 1 (2017): 31–44; M. A. Animashaun, 'State Failure, Crisis of Governance and Disengagement from the State in Africa', *CODESRIA* XXXIV, no. 3&4 (2009): 47–63; M. Mamdani, *Citizen and Subject, Contemporary Africa and the Legacy of Late Colonialism* (Cape Town: Princeton University Press, 1996); A. Mbembe, 'Ways of Seeing Beyond the New Nativism. An Introduction', *African Studies Review* 44, No. 2 (2001): 1–14; A. Mbembe, *On the Postcolony* (London, Berkeley, Los Angeles: University of California Press, 2001): 24–65*;* G. Hoagland, 'The Thing Itself: Quantifying Violence in Subjective Excess', *Crossroads* III, no. II (2009): 51–57; D. Galvan, 'Everyday Transnationalism and the Postcolony in West Africa', *Development and Society* 39, no. 2 (2010): 211–232; G. Ralphs, 'The Contribution of Achille Mbembe to the Multi-disciplinary Study of Africa', *Postamble* 3, no. 2 (2007): 18–29; A. Mbembe, 'Provisional Notes on the Postcolony', *Africa: Journal of the International African Institute* 62, no. 1 (1992): 3–37; A. Mbembe, 'The Value of Africa's Aesthetics', *Mail &*

As an amalgamated theory, postcolonial governmentalities theory offers three main insights that are relevant to this study. First, it addresses the colonial foundations of contemporary governmental practices and the legacies these practices left behind. For instance, it helps understand that the prevalent less accountable governments in Africa have a foundation in the violent and less accountable governments of the colonial era.

Additionally, the theory focuses on the non-European manifestations of governance, showing how power and modern scientific knowledge have combined in African contexts to produce political cultures currently prevalent in these contexts, such as the so-called developmental states in which development statistics are used to justify different forms of authoritarianism. Above all, it helps to understand how colonial power produced postcolonial subjects and institutions.[58]

Secondly, postcolonial governmentalities theory goes into details of what governmentality entails in both colonial and postcolonial settings. According to the theory, violence is used across both settings to suppress dissent, shape conduct and forge subjectivity. In order to function and maintain power, authoritarian governments in both colonial and postcolonial settings employ underdevelopment and weaponise scientific knowledge through use of scientifically rational statistics and the rule of evidence as technologies of control.

Thirdly, the theory illuminates complex practices of reaction to domination, describing them through concepts of counter-conduct, hybridity, ambivalence, conviviality and James C. Scott's 'weapons of the weak'. These concepts show how reaction to domination operates within governmental power, refusing the dichotomy of either pure resistance or co-optation. Whereas counter-conduct and ambivalence address themselves to reaction to domination in general, hybridity was conceptualised to explain relations between the coloniser and the colonised, while conviviality explains relations in postcolonial settings in Africa between the ruling postcolonial elite and ordinary masses. 'Weapons of the weak', on the other hand, deal with everyday reactions to domination through small, mundane acts, thus elevating the

Guardian, 15 May 2015, 6; D. Pucherova, 'Forms of Resistance against the African Postcolony in Brian Chikwava's Harare North', *Brno Studies in English* 1, no. 1 (2015): 160–165.

[58] Teo and Wynne-Hughes, *Governmentalities*, 1–27.

everyday as a site of practices and forms of responding to power. All these concepts come to terms with the various ways through which power is contested.[59]

There are two potential areas of weakness in the amalgamated postcolonial governmentalities theory. First, this is in combining the two theories, yet their key focuses are different. Whereas postcolonial theory is mainly concerned with interrogating power relations which were set off by the colonial experience, governmentality theory is keen on the conduct of governments towards populations. Critics of the amalgamated theory see in this an inherent tension, which renders the resulting conceptual framework unusable. Secondly, whereas postcolonial governmentalities theory casts resistance to power in terms of counter-conduct, conviviality, hybridity, ambivalence, and weapons of the weak, this has drawn opposition from two main sources.

First is the literature on decolonisation, which would rather frame resistance to colonial power as involving visible confrontation, manifested in anti-colonial and anti-apartheid struggles, rather than what the amalgamated theory offers. The second opposition is from Peter Ekeh's two publics conceptualisation, which is seen as having stronger analytical power in explaining African reaction to colonial and postcolonial government, compared to what is offered by postcolonial governmentalities theory.[60]

Despite the noted weaknesses of the postcolonial governmentalities theory, it was employed in this study. The main reason behind this was that the theory provided powerful insights with which to understand the African state and its relations to society. In particular, the theory was relevant in three main areas. First it helped to explain the foundation and continuity in governmental practices between colonial and postcolonial eras in Kenya.

Secondly, it built a picture of the actual actions of the state in Kenya, specifically the practices of governmentality which the government deployed to control the Kenyan society.

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[59] Teo and Wynne-Hughes, Ibid, 19–24; J. C. Scott. *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven and London: Yale University Press, 1990); J. Weate. 'Postcolonial Theory on the Brink: A Critique of Achille Mbembe's "On the Postcolony"', *African Identities* 1, no. 1 (2003): 1–18; E. Obadare and W. Willems *Civic Agency in Africa: Arts of Resistance in the 21st Century* (London: James Currey, 2014).

[60] Teo and Wynne-Hughes, *Governmentalities*, 27; Bowman, 'Conclusion', 240; Burns and Kaiser, eds., *Deleuze,* 30; T. Zeleza, 'The Troubled Encounter between Postcolonialism and African History', *Journal of the Canadian Historical Association,* 17, no. 2 (2006): 89–129; Omeje, 'Postcoloniality', 1–28; Mbembe. 'The Value'; G. R. Murunga, 'Mbembe's "African Modes of Self-Writing" and the Critics in Public Culture', *CODESRIA Bulletin* 1&2 (2004): 27–32; Ralphs. 'The Contribution', 18–29; E. E. Osaghae, 'Colonialism and Civil Society in Africa: The Perspectives of Ekeh's Two Publics', *International Journal of Voluntary and Non-profit Organization, 17* (2006): 8–12.

Thirdly, the theory indicated forms of contestations which emerged out of both colonial and postcolonial control of society. Here, it followed in the tradition set by Grace Musila who employed the framework to study the Kenyan state. Her study demonstrated how the state mobilised murder, both in a formal way during the colonial period, and informally as assassinations in the postcolonial period, to control the Kenyan public.[61]

Ultimately, the postcolonial governmentalities theory was useful in explaining emerging continuities between the colonial and postcolonial eras in the relationship between the state and the LSK. It was used to demonstrate the actual practices of governmentality which the Kenyan state deployed to control the LSK. More importantly, using its analytical frameworks of counter conduct, hybridity, ambivalence, weapons of the weak and conviviality, the postcolonial governmentalities theory helped to demonstrate the LSK's reaction to state excesses. In this way, the theory helped to cast new light on how the state behaved and societal response to the same.

1.9 Methodology

1.9.1 Introduction

This section explains the methodology which was utilised to establish study findings. It explains the research design, sources of information, data collection instruments, data analysis and interpretation, as well as ethical issues in light of the study and how they were dealt with. This is as discussed in the foregoing.

1.9.2 Research Design

The research design for this study was ex-post facto (after-the-fact). This was mainly because the study dealt with historical events which had already taken place and which the study set out to establish. Within the ex post facto research design framework, the study utilised three main approaches to data collection. These comprised of archival data, data from secondary literature and oral data. Archival data was sourced from primary sources reporting on LSK pronouncements and activities. These consisted of KNA files, contemporary newspapers as well as news magazines such as the defunct *Weekly Review*. Archival data mostly covered the colonial, Jomo Kenyatta and Moi eras. It should be noted that although at least two physical visits were undertaken to the LSK headquarters along Gitanga Road in Lavington, Nairobi to

[61] Musila, 'Assassin State', 167–173; Teo and Wynne-Hughes, *Governmentalities*, 9–19.

access official minutes of the LSK council meetings for additional archival information, the effort did not yield much relevant information.

1.9.3 Sample Population

Oral data was obtained both from interviews which the researcher conducted directly with target informants and from interviews and documentaries sourced mainly from mainstream media houses. The interviews targeted a study population constituted by key informants who had served the LSK in official capacity, either as chairpersons/presidents or council members. Given the study period of between 1920 and 2022, this gave a total study population of 402, which constituted at least 1 chairperson/president and at least 3 council members per year. The study then sampled at least 50 key informants from the total study population using the purposive sampling technique. This was to ensure the adequate representation and objectivity of the data collected.

However, this proved excessive for two main reasons. First, informants who were interviewed provided similar information, thus making further interviews repetitive and unnecessary. Secondly, several informants referred the researcher to interviews which they had given to mainstream TV stations, stating that these interviews already contained information which the researcher sought. Based on this feedback, the researcher sought additional oral data from interviews conducted by the mainstream TV stations as well as from documentaries on prominent personalities in Kenya's legal profession. Two of the most prominent of these documentaries were 'Makers of a Nation,' developed by Hillary Ngw'eno in collaboration with the Nation Television (NTV) and *'Mirathi Ya Siasa,*' developed by Kenya Television Network (KTN). Both series of documentaries were sourced from the respective YouTube channels of the two TV stations.

Both oral and archival data were corroborated and complemented with secondary data. Secondary data was sourced from a variety of sources, including theses and dissertations, commission reports, conference papers, journal articles and book chapters as well as books and internet sources. It also came from magazines and newspapers by outlets such as *The Nairobi Law Monthly*, the defunct *Finance* and *Society*, and mainstream media outlets such the *Daily Nation* and *The Standard*.

1.9.4 Data Collection

Each of the three main sources of data for the study (archival, oral and secondary) were obtained using data collection instruments designed to extract relevant information from them. For archival and secondary literature, these were extracted using a criterion based on the objectives set out in the study. On the other hand, oral data was obtained through Key Informant Interviews (KII) using interview schedules and a digital voice recorder, which were administered to key informants in various locations across Nairobi. Additional oral data was obtained by extracting information from YouTube videos of interviews of target key informants conducted by TV stations. It was also obtained through extracting relevant information from documentaries on key personalities in Kenya's legal and governance spheres.

1.9.5 Data Analysis and Interpretation

The data obtained through the data collection instruments indicated above was taken through a 4-stage process of verification and sense-making. The first stage involved external criticism, through which sources from which data was to be obtained were gauged for authenticity and relevance. The second stage involved the transcription of the data to transfer it into formats which could allow for further analysis. The third stage involved internal criticism of the information obtained for accuracy. The final stage consisted of analysis of the data based on the objectives of the study and was organised according to the sub-themes indicated in the chapter outline. Three analytical frames were used to interpret the data. These consisted of documentary review, content analysis and theoretical reflections. Documentary review and content analysis involved triangulation and cross-checking of one source against another. Theoretical analysis, on the other hand, involved using postcolonial governmentalities theory to interpret the data collected.

1.9.6 Ethical Issues

The study followed all the ethical guidelines for undertaking a research of this nature. In line with this, a research permit was sought and obtained on 16 June 2021 from relevant regulatory authorities. The consent of the target informants was also sought prior to interviewing them. All necessary measures were taken to utilise the information provided only for purposes of this study. All information obtained was treated with utmost confidentiality, and sources were not disclosed, except with their express permission.

1.9.7 The Study Structure

The study is structured into seven chapters. Chapter 1 provides the introduction and general background to the study. Chapter 2 examines the emergence of the LSK and its interaction with the colonial administration in Kenya up to 1963. Chapters 3 to 6 examine the relationship between the LSK and the administrations of Jomo Kenyatta, Daniel arap Moi, Mwai Kibaki and Uhuru Kenyatta respectively. Chapter 7 draws the study to a conclusion by revisiting each of the study objectives. It also draws recommendations based on the conclusion reached for each of the objectives.

CHAPTER TWO

LSK AND THE COLONIAL ADMINISTRATION, 1922–1963

2.1 Overview

The objective of this chapter is to examine the emergence of the LSK and its interaction with the colonial administration in Kenya up to 1963. It addresses three specific research questions. These are, first, the rule of law set up which the colonial administration established; secondly, the measures taken by the LSK to promote the rule of law under colonial rule; and thirdly, the response of the colonial administration to LSK's attempts to promote the rule law. The chapter is divided into four main subsections, with the first three responding to the three research questions, while the fourth provides a summary to the chapter.

2.2 Rule of Law in Colonial Kenya

The British Empire transformed the territory which would later form the modern state of Kenya by taking it through at least four types of governmental arrangements. In 1886, Britain mandated the territory to the Imperial British East Africa Company (IBEAC) as a commercial venture. Then on 1 July 1895, Britain declared the territory a protectorate. In July 1920, Britain turned most of the territory with the exception of the coastal strip into a Crown Colony. The coastal strip remained a protectorate under the Sultan of Zanzibar.[1] This remained the status until June 1963, when both the hinterland and coastal strip were transformed into a self-ruling territory under the British Empire. The status of Kenya as a self-governing territory under the British Empire lasted until 12 December 1964, when the territory became a republic independent of Britain.[2]

Except perhaps for the brief era of self-rule from June 1963 to December 1964, the rest of the governmental arrangements under colonial rule in Kenya witnessed minimal adherence to the

[1] H. J. Ndzovu, *Muslims in Kenyan Politics: Political Involvement, Marginalization, and Minority Status*, Evanston Illinois: Northwestern University Press, 2014, 17–21.

[2] J. B. Ojwang', 'Government and Constitutional Development in Kenya, 1895–1995', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895–1995*, ed. Bethwel A. Ogot and W. R. Ochieng' (Maseno: IRPS, 2000), 152–154; E. S. Atieno-Odhiambo, 'Mugo's Prophecy', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895-1995*, 7–8; B. A. Ogot, 'Boundary changes and the invention of "tribes"', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895-1995*, 20–21.

rule of law. The concept of rule of law entails adherence to several cardinal principles.[3] The three most relevant for this study consist of first, the principle of the existence of rules to which everyone is subjected. This principle is manifested in the existence of a supreme law such as a constitution, within which is contained a Bill of Rights whose main role is to protect individuals from arbitrary actions of the state. The second principle is manifested in a system of checks and balances, where the three main state institutions, the executive, the judiciary and parliament relate to each other horizontally. This provides them with separate but equal and independent powers and responsibilities, which enable them to check on each other. The third principle entails respect for due process in which only competent and independent courts of law determine punishment for any transgressions of the law.[4]

Relating the first three epochs of colonial governance, namely IBEAC, Protectorate and Crown Colony, the three principles of the rule of law run into anachronism. This is because governance under the three epochs was mainly focused on a paternalistic notion of civilising the indigenous Kenyan populations.[5] This notion not only dominated the colonial mode of thought, but also guided the mode of colonial rule under all the three epochs. Although the colonial administration introduced some ordinances which outlawed some harmful customary practices such as those against witches, this did not constitute adherence to the rule of law.[6] Instead, it was an example of the top-down nature of colonial imposition of ordinances on African populations for purposes of controlling them outside the notion of the rule of law.[7]

Starting with the first principle of existence of rules to which everyone is subject with an inherent Bill of Rights for protecting individuals from the arbitrary actions of the state, colonial rule lacked any notion of constitutional rule until very late in its life. Instead, it relied on ordinances drawn from the British common law and administrative proclamations initially

[3] There are numerous accounts of what constitutes the rule of law. This study has settled for those provided by A. V. Dicey, who is considered the father of rule of law, as the most relevant for it. The reason for the choice of Dicey's principles over the rest is because they are mostly focused on the relationship between the state and society, which is the focus of this study.
[4] Harvey, Ibid; H.F. Morris, *Perspectives*, 13.
[5] Makau Mutua, 'Rule of law as a terrain of contest', *The Nairobi Law Monthly*, 10, No. 7 (2018): 68-69.
[6] Sihanya, Interview.
[7] Berman, *Control*, 49–55; Okech Owiti and William Mbaya, 'Public Order and Preservation of Public Security Law in Kenya', in *Democratization and Law Reform in Kenya,* ed. Smokin Wanjala and Kivutha Kibwana (Nairobi: Claripress Limited, 1997), 43.

dictated by metropolitan British institutions, but later formulated by the emergent local colonial bureaucracy headed by the Governor.[8]

The ordinances replaced African customary traditions, which had been the basic source of regulations for African communities in the pre-colonial era. The traditions were unwritten and distinct from one community to another. They came from three main sources: the cultural practices and rituals observed by the communities; the edicts and proclamations of leaders who wielded centralised authority, especially in societies with centralised power such as the Wanga under the Nabongo in Western Kenya; and Sharia, particularly in areas which were dominated by Islam such as the Coastal Strip.[9]

With ordinances and administrative proclamations featuring heavily as the main tools for governance during most of the colonial period, this inevitably elevated the executive arm of the colonial government into dominance. In turn, this left the colony without significant advancement in the other two principles of the rule of law, namely checks and balances and due process.[10]

Constitutional Rule in Colonial Kenya

The beginning of constitutional rule in colonial Kenya can be traced to the early 1950s. It was largely attributed to internal and external pressure for decolonisation. The very first Kenyan constitution was the Lyttleton Plan of 1954, which not only signalled the start of significant political reform but also marked the very first attempt to institute the rule of law in the country. Its main focus was to create a multi-racial society in which indigenous Africans and non-indigenous groups such as white settlers, Asians and coastal Arabs would be involved in the country's governance. The most significant reform provided for by the Lyttleton Plan was to permit African representation in the colonial government. This led to the appointment of

[8] Owiti and Mbaya, 'Order', 43; Ojwang', 'Government', 149–150; B. A. Ogot, 'The Settler Dream of White Dominion', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895–1995*, 51.
[9] Morris, *Perspectives,* 13; Ojwang', 'Government', 148; Stephen Ndegwa Mwangi, *A History of Constitution-Making in Kenya* (Nairobi: Media Development Association and Konrad Adenauer Stiftung, 2012), 2.
[10] Lonsdale, 'Conquest', 6; K. Kibwana, S. Wanjala and O. Owiti, eds., *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives* (Nairobi: Claripress Ltd, 1996), 14-15; Ojwang', 'Government', 150.

Beneah Apollo Ohanga as the first African in the colonial Executive Committee (ExCo) as Minister for Community Development and African Affairs.[11]

The Plan also allowed for nomination of the first eight African representatives into the colonial legislature, the Legislative Council (LegCo) in 1957, where they joined Eliud Mathu, who had been nominated to the institution in 1944. Among the new representatives were the Minister Ohanga (representing Central Nyanza), W. W. W. Awori (North Nyanza), Jimmy Jeremiah (Coast), F.K. arap Chumah (South Nyanza), James Muimi (Ukambani) and Daniel arap Moi (Rift Valley). The new African members formed several lobby groups, beginning with the African Elected Members Organisation (AEMO), which agitated for more changes to the Lyttleton Plan and subsequent constitutions in favour of Africans.[12]

Despite launching modern Kenya into its first attempt at the rule of law, the Lyttleton Plan had two main weaknesses. First, it did not roll back the ordinance which restricted African political activity to indigenous districts and within trade unions such as the Kenya Federation of Labour (KFL). Secondly, the plan failed to garner support from both indigenous Africans and the non-indigenous groups, particularly the white settlers.[13]

The failures of the Lyttleton Plan led to the Lennox Boyd Constitution, enacted in 1958. The Boyd Constitution mainly increased the number of African representatives into both the LegCo and the ExCo. Within the LegCo, the numbers of African representatives increased from eight to 14. The new members were Jaramogi Oginga Odinga (Central Nyanza), Julius Gikonyo Kiano (Central Province South), Tom Mboya (Nairobi), Jeremiah Nyagah (Nyeri and Embu), Taita Towett (Southern Area), Masinde Muliro (North Nyanza), D. I. Kiamba (Machakos), Justus ole Tipis (Central Rift) and F. J. Khamisi (Mombasa Area). The new Constitution also lifted some of the restrictions against African political activity, allowing for elected African representatives to engage with their local constituencies.[14]

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[11] Berman, *Control*; R. Maxon, *Britain and Kenya's Constitutions –1950–1960* (Cambria: Cambria Press, 2020); T. Mboya, *Freedom and After* (Nairobi: East African Educational Publishers, 1986), 115–129; Ojwang', 'Government', 151.

[12] O. Odinga, *Not Yet Uhuru* (Nairobi: EAEP, 1967), 151; D. Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget* (Nairobi, Kampala, Dar es Salaam and Kigali: Kenway Publications, 1982), 73; W. Maloba, 'Nationalism and decolonization, 1957–1963', in *A Modern History of Kenya*, 191.

[13] A. Morton, *Moi: The Making of an African Statesman* (London, Michael O'Mara Books Limited, 1998), 90–91; Owiti and Mbaya, 'Order', 47; Goldsworthy, *Mboya*, 76–80.

[14] Ojwang', 'Government', 151; Berman, *Control*, 399- 405; Mboya, *Freedom*, 75; Odinga, *Uhuru*, 153–162; Maloba, 'Nationalism', 192.

However, like the Lyttleton Plan, the Lennox Boyd Constitution failed to garner support from powerful interest groups, among them the AEMO. Now under the leadership of Odinga, AEMO called for a boycott of the six new slots which the Lennox Boyd Constitution offered, arguing that this was far less than the additional 15 slots it had initially demanded for African representatives.[15] Furthermore, other indigenous groups emerged to demand for representation in the LegCo, prominent among these being African Muslims on the Kenyan coast, who argued that Muslim representation in the LegCo was confined to Arab Muslims.[16]

Within the nascent African nationalist movement, differences emerged over visions of the ideal constitutional model. These led to the split of the AEMO, which had just rebranded into the Constituency Elected Members Organisation (CEMO), into two African pressure groups. On the one hand was the Kenya Independence Movement (KIM) jointly led by Tom Mboya and Jaramogi Oginga Odinga, and on the other, the Kenya National Party (KNP) associated with the Coastal representative Ronald Ngala, the North Nyanza representative Masinde Muliro and the Rift Valley representative Daniel arap Moi.

Among white settlers, similar groups emerged, also differing over the ideal constitutional model for the country. These were the United Kenya Party (UKP) of Captain Llewellyn Briggs and the New Kenya Party (NKP) of Michael Blundell. The proliferation of these groups provided sufficient pressure that undermined the Lennox-Boyd Constitution. The political settlement which the Constitution had provided was further undermined by the massacre of Mau Mau detainees in Hola Prison in March 1959.[17]

Together, the pressure from the political groups and the public outcry following the massacre compelled the Secretary of State for Colonies, Iain Macleod, to convene a constitutional conference at Lancaster House in London from January 1960. The purpose of the conference was to draft a new constitution for the Kenya Colony. This became the first of the three constitutional conferences held in London and which culminated in Kenya's Independence Constitution in 1963.[18]

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[15] Goldsworthy, *Mboya*, 19, 112–113.
[16] Ndzovu, *Muslims*, 34–35.
[17] Goldsworthy, *Mboya*, 82–88; Elkins, *Gulag*, 345–355.
[18] W. Ochieng, 'Independent Kenya: 1963–1986', in *A Modern History of Kenya: 1895–1980,* 204; R. M. Maxon, 'The Colonial and Foreign Offices: Policy and Control', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895–1995*, 46; Berman, *Control*, 405–417; Goldsworthy, *Mboya*, 131–138; Mwangi, *Constitution-Making*, 4–7; K. Kindiki, 'History of Kenya's Constitution-Making Project in Kenya's Constitutional Moment', *Rule of Law Report 2009–2010* (2010): 2–5.

The first Lancaster House conference resulted in the Macleod Constitution. It was signed into law on 30 November 1960 by the Queen of England, who was the titular head of the Kenya Colony. The Macleod Constitution became the first Kenyan constitution to contain a Bill of Rights. The Bill covered political/civil rights, personal liberties, the right to due process, respect for private life as well as freedoms of conscience and assembly. To ensure its enforcement, the new Constitution prohibited future governments from measures which had been outlawed in the Bill of Rights. The Constitution also assigned the enforcement of the Bill of Rights to the Privy Council in London.

Besides the Bill of Rights, the Macleod Constitution also contained elaborate provisions on economic rights, where it emphasised equality of economic opportunity. Not only did it outlaw racial prohibitions on land, but also provided for procedures of compulsory acquisition of property. It stated that no property could be taken unless it was under the willing-buyer-willing-seller arrangement.[19]

In terms of political reforms, the Macleod Constitution expanded further African representation in the LegCo to 53 members. It also introduced universal suffrage as the basis for elections in a future Kenya. Unlike the two earlier constitutions, the Macleod Constitution lifted the restrictions on nation-wide African political organisation. This in turn entrenched the split in the nascent African nationalist movement, with the two earlier formations KIM and KNP solidifying into the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) respectively by 1961.[20]

The changes introduced by the Macleod Constitution laid the basis for the May 1961 elections, with the two African political parties, KANU and KADU, participating for the first time. KANU attained dominance among the Kikuyu and Luo ethnic groups, while KADU coalesced around 'smaller' ethnic groups, led by Ngala, Muliro and Moi. KANU won the elections with 19 seats against KADU's 11. However, KANU refused to form government, insisting that it could only do so after the release from prison of Jomo Kenyatta, who had been convicted for association with the Mau Mau group. KADU went ahead and formed a coalition government with the support of the white settlers' UKP and the Indian Congress.

[19] Ogot, 'Dominion', 68.
[20] Ojwang', 'Government', 151–152; Odinga, *Uhuru*, 176–180; Morton, *Moi*, 90–107; Ogot, 'Dominion', 67; Maloba, 'Nationalism', 193.

This left KANU in the role of the opposition, and it used this platform to agitate for not just the release of Kenyatta but also additional changes to the Macleod Constitution.[21]

The Ngala-led coalition government faced at least four main challenges related to the provisions of the Macleod Constitution. First, it found it difficult to implement the elaborate Bill of Rights provisions which the Constitution had set up. Secondly, the provision on equality of economic opportunity limited the ability of the Ngala government to undertake economic reforms, including raising taxes from white settlers for desperately-needed social programmes targeting Africans. Thirdly, majority of the Africans opposed the Constitution, feeling it was an imposition by the British government in favour of white settlers. This was particularly so among the populous Kikuyu community, one of the most significant political constituencies.[22] The continued popularity of the jailed Jomo Kenyatta and the return of Mau Mau followers from restriction added to the challenges which the Ngala administration faced. Whereas there was fear that the returned Mau Mau followers would revert to violence, the influence of Jomo Kenyatta on the country's politics even from jail caused anxiety among white settlers, and many of them fled the country, compounding further the country's economic crisis.[23]

Due to the failure of the Macleod Constitution to respond to these challenges, a second Lancaster conference was convened from January 1962. It drew several delegations, with Kenyatta, who had been released from prison, leading the KANU delegation, while Ngala led the KADU delegation. A major issue of debate in the conference was the structure of government, whether unitary, which KANU supported, or regional, which KADU and the white settlers preferred.[24]

The outcome of the second Lancaster conference was the Maudling Constitution, named after Reginald Maudling, the Colonial Secretary who had convened the conference. It accepted the demand for regionalism but set up a coalition government in which it compelled KADU to share power with KANU. The period of the KADU-KANU coalition government under the Maudling Constitution witnessed continued debate on the structure of government outside the

[21] W. Ochieng, 'Independent Kenya', 205.
[22] O. W. Khobe, 'The Quest for a more perfect democracy: Is mixed member proportional representation the answer?' in *Human Rights and Democratic Governance in post-2007 Kenya: A post-2007 Appraisal,* ed. Morris Kiwinda Mbondenyi (et al) (Pretoria: Pretoria University Law Press, 2015), 121.
[23] Odinga, *Uhuru,* 217; 'The Lyttleton Constitution', *Kenya Yearbook 2010,* Kenya Editorial Board, Government of Kenya http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 06/07/2020); Ojwang', 'Government'.
[24] Named after then UK Colonial Secretary, Reginald Maulding.

confines of the Lancaster House. As part of the debate, Kenyatta and Ngala as the respective leaders of KANU and KADU organised a conference in Nairobi in August 1962, dubbed 'the Kenya We Want.' The conference focused particularly on the sharing of security and financial resources between the central and regional governments.

The Nairobi conference became the basis for discussions at the third and final Lancaster Conference convened in early 1963. The conference resulted into Kenya's Independence Constitution, which led to the elections of May 1963. The elections ended the KANU-KADU coalition government and elevated KANU into power. They also ushered Kenya into a self-governing territory within the British Empire.[25]

Overall, rule of law did not exist during the colonial period. The relationship between the colonial administration and rule of law shows little evidence of existence of rules which restricted the administration from excesses for much of the colonial era. It was only after the Second World War, with the rise in agitation for decolonisation, that led to active engagement with constitutionalism between 1954 and 1963.[26]

The overall effect on the rule of law and state restraint was that the colonial government ruled first without reference to any rules except ordinances which it imposed on Africans. Secondly, under pressure from decolonisation, it belatedly commenced a series of constitutional restraints, especially when power was slipping away from it. The colonial administration therefore left a scant legacy of the rule of law underwritten by respect for the constitution.[27]

As for the Bill of Rights, much like constitutionalism, this was not enacted in the country until towards the end of the colonial era. During much of the colonial era, African populations were subjected to arbitrary ordinances which violated individual and collective rights in the political, economic and social realms. In the political realm, Africans had little influence in the establishment of the colonial state and were denied the right to participate as equals to other non-indigenous groups in its governance.[28] In the economic sphere, the

[25] Odinga, *Uhuru*, 222–231; Morton, *Moi*, 107–117; Goldsworthy, *Mboya*, 191–218; Mwangi, *Constitution-Making*, 7–10.
[26] Mboya, *Freedom*, 75.
[27] M. Lower, 'The Staying Power of Self Interest: Kenya's Unshakeable Elites', *Neo: A Journal of Student Research*, (2012): 4.
[28] B. A. Ogot, 'Boundary changes and the invention of "tribes"', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895–1995*, 22–23; Berman, *Control*, 199–246; Odinga, *Uhuru*, 15–21; Atieno-Odhiambo, 'Prophecy', 6; Maxon, 'Offices', 35–36; Lonsdale, 'Conquest', 11; Njenga Karume and Mutu wa

colonial administration destroyed African economic initiative and subverted it to the white settler economy. Africans lost land, livestock and labour to the white settler economy, besides facing heavy taxation, hostile labour ordinances and restrictions of movement in the labour market.[29] In the social realm, the colonial administration perpetrated inequalities between indigenous Africans and the settler populations. Until the late 1950s, it prohibited intimate relations between white and indigenous populations, but with a different set of punishments for those breaking the prohibition. Whereas Africans found to have violated the prohibition would face the death penalty, white populations on the other hand would be let free.[30]

The administration equally perpetrated ethnic mistrust by using stereotypes to govern and determine opportunities for different African ethnic groups. In addition, it ignited ethno-geographic inequalities by perpetrating differences in access to services in different regions of Kenya.[31] When the Bill of Rights was eventually introduced within Kenya's third constitution, the Macleod Constitution of 1960, it did little to secure the individual and collective rights of Africans. Although it covered an expansive list of rights and set in place measures to prohibit future governments from encroaching on the rights, its main intention was to protect white settler rights, rather than advance collective African interests. As such, it received lukewarm support from the majority of Africans.[32]

Checks and Balances under Colonial Rule

As for the second cardinal principle of the rule of law, namely a system of checks and balances as well as separation of powers among the executive, the judiciary and parliament, little existed for most of the colonial period.[33] Under the nine-year IBEAC rule between 1886

Gethoi, *Beyond Expectations: From Charcoal to Gold* (Nairobi: Kenway Publications, 2009), 108–115; Maina wa Kinyatti, *The Pen and the Gun* (Nairobi: Mau Mau Research Center, 2006), xxiii–xxix.

[29] Odinga, *Uhuru*, 88–89; Mboya, *Freedom*, 48; Ogot, 'Dominion', 58; Kibwana, Wanjala and Owiti, *Corruption*, 12–14; Zeleza, 'Establishment', 42–62; Berman, *Control*, 58–69; Lonsdale, 'Conquest', 18; Karume and Gethoi, *Gold*, 116–117; 'The Stolen Land', *Kenya Yearbook 2010*, Kenya Editorial Board, Government of Kenya, http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 06/07/2020); G. W. Mbaria, 'How British colonial policy fanned marginalisation', *Daily Nation*, 11 January 2019, 21; K. Ngotho, 'How instigators created rift of fear in Rift Valley', *Sunday Nation*, 7 April 2019, 22; J. T. Gathii, 'Kenya's Long Anti-Corruption Agenda: 1952–2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution', *Development Review* 182, no. 4 (2011): 7–14; L. Franceschi, 'The making of an extractive state: Kenya's 1920s and beyond', *Daily Nation*, 13 March 2020, 14.

[30] J. Kamau, 'Argwings-Kodhek: The politician history should never forget', *Sunday Nation*, 27 January 2019, 32.

[31] G. O. Magaga, 'The African Dream:1920–1963', in *Kenya - The Making of a Nation: A Hundred Years of Kenya's History, 1895–1995*, 79–80; Ogot, 'Invention', 28; L. Franceschi, 'Historical injustices taught us how to defeat the rule of law', *Daily Nation*, 19 July 2019, 34.

[32] O. W. Khobe, 'Quest', 2015, 121; *Lyttleton*, Kenya Editorial Board.

[33] Ogot, 'Invention', 28; Ojwang', 'Government', 150; Kibwana, Wanjala and Owiti, *Corruption*, 14–15.

and 1895, the country was subjected to a form of power characterised as corporate sovereignty. Under this power, a few of the institutions which the IBEAC established were solely aimed at pacifying indigenous populations to extract resources from the Kenyan territory which would earn the company massive profits. It lacked any form of restraint.[34]

The replacement of IBEAC rule with protectorate and Crown Colony epochs did not improve the rule of law terrain considerably, especially in relation to indigenous populations.[35] Nonetheless, within each epoch, there arose notable differences in terms of the institutions which emerged. First, whereas under IBEAC rule most of the emergent institutions were geared towards pacification of indigenous populations with the intention of extracting resources for company profit, under protectorate and later Crown Colony rule, the institutions were modified to govern indigenous populations. An example of an institution which emerged under IBEAC rule, but which was further modified in subsequent epochs was the colonial police force. The force was first set up in 1887 under Sir William Mackinnon. It was based on three Indian laws, namely the Indian Penal Code, the Indian Criminal Procedure Act, and the India Police Act. The force was initially headquartered in Mombasa and was dominated by Asians. As IBEAC expanded beyond the Coastal strip, its numbers increased, boosted by the recruitment of indigenous Africans.[36]

With the end to IBEAC mandate in July 1895, the force was taken over by the British Foreign Office, which established a Protectorate administration on the Kenya territory. Although still retaining the policy of recruiting indigenous Africans into the force, the new administration nonetheless introduced two main changes to the force. First, it intensified the training of the force's recruits, with a focus on military rather than policing tactics. Secondly, through the 1902 Village Headman Ordinance, the administration created the Administration Police as a unit within the force. The main purpose of the new unit was to enforce the various policy measures which the new administration had enacted for Africans, including payment of taxes, control of livestock and enforcement of crop production policies. Even with the reforms, the

[34] Ojwang', 'Government', 149; Berman, *Control,* 49–55; Atieno-Odhiambo, 'Prophecy', 6.
[35] Ogot, 'Invention', 20–21; Ojwang,' 'Government', 152–154.
[36] Lonsdale, 'Conquest', 9–10; Y. Furuzawa, 'Two Police Reforms in Kenya: Their Implications for Police Reform Policy', *Journal of International Development and Cooperation,* 17, No. 1 (2011): 52–54; E. A. Gimode, 'The Role of the Police in Kenya's Democratisation Process', in *Kenya: The Struggle for Democracy,* ed. Godwin R. Murunga and Shadrack W. Nasong'o (London and New York: CODESRIA Books, 2007), 229–233; Maxon, 'Offices', 33–34.

emerging police force remained hostile to indigenous Africans, and even those Africans recruited into it deserted due to unfavourable conditions of work prescribed for them.[37]

In 1926, the colonial administration introduced yet another unit within the force. This was the intelligence unit, whose focus was on collecting information. It became one of the most frequently cited institutions in many of the excesses which characterised the colonial era. For instance, with the declaration of the State of Emergency in October 1952 in the wake of the Mau Mau uprising, a period characterised by arguably the greatest violations of the rule of law in the entire colonial period, the unit was extensively deployed to hunt down Mau Mau suspects.[38]

The second notable difference between IBEAC and subsequent protectorate and Crown Colony rule was that under the latter, the colonial administration was placed under the scrutiny of metropolitan institutions in the UK. The Colonial Secretary, who was the head of the colonies and part of the British executive, was subject to the British system of checks and balances, especially the British parliament, where members of the British opposition often raised questions with regard to executive conduct in the colonies. The Secretary was also checked by the British vertical accountability institutions, among them the British media, the Anglican Church and the British humanitarian agencies, as well as emergent institutions of international governance such as the ILO after the Second World War.[39]

The third difference between the IBEAC and the other two later forms of colonial administration led to a gradual evolution of a system of checks and balances. These included early forms of parliament, the judiciary, the political opposition and electoral politics.[40] Their emergence coincided with the increasing numbers of white settlers in Kenya, especially after the completion of the Uganda Railway in December 1901.[41] With their emergence closely linked to the increased white settlement in Kenya, the new institutions were mainly created to cater for the white settler population and did little to help indigenous populations in checking the powers of the colonial administration. For the indigenous populations, the colonial

[37] Gimode, 'Police', 234; Lonsdale, 'Conquest', 9–11.
[38] Kinyatti, *Gun*, xxiii–xxix; Nyambega Gisesa, 'How NIS regained Uhuru's trust and confidence', *Sunday Nation*, 19 January 2020, 18; Sihanya, Interview.
[39] Maxon, 'Offices', 33; Berman, *Control*, 67; Goldsworthy, *Mboya*, 40; R. M. Maxon, 'Advance', 77–79; Elkins, *Gulag*, 91–93; Judith K. Akuma and Babere Kerata Chacha, *Francis Atwoli - Fame, Force and Fury: A Biography* (Nairobi: Moran Publishers, 2019), 23; Muchemi Wachira, 'Wilson Boinett: Military man who turned around NIS', *Daily Nation*, 11 September 2014, 6.
[40] Ojwang', 'Government', 150; Kibwana, Wanjala and Owiti, *Corruption*, 14–15.
[41] Elkins, *Gulag*, 1–3; Ogot, 'Dominion', 63–64.

administration introduced the Native Affairs Commission and assigned it the role of protecting indigenous interests.[42]

Parliament was the first checks and balances institution to be introduced during the colonial era, specifically under the epoch of protectorate rule, existing in an early version between 1897 and 1907. It was formally instituted in 1920, taking on the name the Legislative Council (LegCo). This was as a result of the pressure from the white settler minority, which demanded that the colonial administration gives the group a formal platform through which it would articulate its interests in the administration's policies.[43] Until 1944 when Eliud Mathu was appointed as the first indigenous African representative, the LegCo largely remained out of reach for indigenous populations.[44]

With increased agitation for independence which began in earnest after the Second World War, the LegCo witnessed an increase in the numbers of indigenous African members, mostly consisting of the newly educated Africans. The increase gradually transformed the checks and balances capabilities of the institution in favour of Africans, as it became a much more assertive mechanism for Africans to put demands on the colonial administration. For instance, speaking on the floor of the LegCo in 1956, W. W. W. Awori demanded to have more Africans educated as lawyers when the House was debating the government's education policy.[45] Even so, the LegCo remained under the control of the colonial executive throughout the colonial period, and was largely ineffective as a checks and balances institution against the excesses of the colonial administration towards indigenous populations.

With the LegCo out of reach for indigenous Africans for most of the colonial period, their issues were addressed through the Local Native Councils (LNCs). These were created under the Crown Colony epoch in 1924. Their main purpose was to address native grievances and pass native regulations, but under the heavy supervision of the colonial Provincial Administration. Council members consisted of colonial chiefs, elected representatives and nominees of the colonial administration.

[42] Maxon, 'Offices', 39; Berman, *Control*, 84–85.
[43] Berman, *Control*, 128–187; Ndzovu, *Muslims*, 27–28; Kibwana, Wanjala and Owiti, *Corruption*, 15; Odinga, *Uhuru*, 136; Maxon, 'Advance', 73.
[44] Ogot, 'Dominion', 63–64; Maxon, 'Advance', 73.
[45] O. Odera, *My Journey with Jaramogi: Memories of a Close Confidant* (Nairobi: African Research and Resource Forum [ARRF], 2010), 31; Morton, *Moi*, 85; Odinga, *Uhuru*, 142–144; Shah, 'Politics of the law'.

The LNCs were transformed into African District Councils (ADCs) in 1950. However, this did not change their subservience to the colonial administration. Compared to the LegCo, the LNCs/ADCs were a direct extension of the colonial executive. Whereas the LegCo exerted substantive oversight on the colonial executive in relation to non-indigenous interests, the LDCs/ADCs, on the other hand, were under the direct control of the colonial District Commissioner (DC) who served as their chairman.[46]

Such was the control which the DC wielded over the LDCs/ADCs that if policy disagreements emerged between him and Council members, he could recommend to the Minister for Local Government for the Council's dissolution. This actually happened to the Central Nyanza ADC which was dissolved in 1958 due to refusal by council members to support the colonial government's afforestation policy in Kisian near Kisumu. The case led to further reduction of powers of the ADCs. Besides dissolving the ADC, the Minister for Local Government instituted changes on the membership of the ADC. Under the new changes, there would be no more elected members in the councils, with the DC nominating the members. Furthermore, each administrative unit was to be represented by one member, down from the initial two members.[47]

A second checks and balances institution whose early form emerged under colonial rule was the judiciary. Prior to colonisation, communities living in Kenya relied on different customary rules. In societies with centralised authority such as the Wanga under the Nabongo, some form of courts existed to enforce the chief's orders. In acephalous societies, on the other hand, communal norms were administered by distinct groups such as a council of elders. For the coastal region under Islamic influence, the predominant judicial system was based on the Sharia.[48]

The colonial administration replaced the existing judicial systems with three distinctive juridical orders. The first order consisted of a system of laws and courts borrowed from Britain. It was introduced in the country in 1897 through the East African Order-in-Council.

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[46] Ojwang', 'Government', 150; Ogot, 'Dominion', 51–52; Odinga, *Uhuru*, 66–67; K. Ngotho, 'My encounter with Eliud Mathu, a man of many firsts', *Sunday Nation*, 27 September 2020, 28; Berman, *Control*, 208–218; M. Odhiambo, W. Mitullah and K. S. Akivaga, *Management of Resources by Local Authorities: The Case of the Local Authority Transfer Fund in Kenya* (Nairobi: Claripress, 2005), 50–54; G. Lynch, 'Moi: The Making of an African "Big Man"', *Journal of Eastern African Studies*, 2, No. 1 (2008): 21.

[47] Odinga, *Uhuru,* 89–136; J. Osogo, 'The day I met Odinga my life totally changed', *Daily Nation*, 31 July 2020, 6.

[48] J. O. Oseko, 2011. 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform', PhD diss., University of Leicester, pp. 85–96.

The system was modelled largely along the British judicial system, with a heavy influence from the Secretary of State for Colonies, who was the executive head of the colonies.[49] Under the system, law was dispensed by courts run by the colonial executive. It witnessed the fusion of executive and judicial powers until after the Second World War.[50]

Although this first judicial system was supposed to cover the entire population of the Kenya colony through Orders-in-Council, this was not the case for majority Africans. For Africans, the colonial administration introduced a second judicial system. This was through the 1907 Native Tribunals Ordinance, which established Native Tribunals. It placed the Tribunals under the direct control of the Chief Native Commissioner, who used native chiefs appointed by the Provincial Administration to administer justice to Africans. The Native Tribunals system was based on customary law, but with significant modifications aimed at promoting colonial rule. The colonial administration justified the existence of the system on the basis that it would deal with minor, less complicated cases involving Africans. The third judicial system was based on the Sharia law administered by the Kadhi courts. It was confined to the Coastal Strip, amongst communities which had converted to Islam.

The three systems of justice gave the colonial-era judiciary a triple character. On the one hand were colonial officials and high courts with jurisdiction over all races, administering law made locally but with heavy borrowing from the British law. On the other hand, there were native and Kadhi courts whose jurisdiction was confined to Africans and Muslim converts respectively.[51] The relationship between the colonial executive and especially the native and British-style systems of justice demonstrated that both the British-style and native courts were extensions of the colonial executive and were thus not effective in restraining the colonial state. The British-style courts were not only dominated by British appointees of the colonial executive but were also used to drive government policy.[52] As such, they were complicit in many of the crimes of the colonial administration. This complicity was exhibited in a number of cases. One such case involved attempts by a group of Africans in *Ole Njogo and Others vs The Attorney General* to use the colonial judiciary to contest the loss of their

[49] M. K. Mbondenyi, 'Unclogging the wheels of justice: A review of judicial transformation in the post 2007 period', in *Human rights and democratic governance in post-2007 Kenya: A post-2007 appraisal*, 328–330; Kibwana, Wanjala and Owiti, *Corruption*, 15–16.
[50] Oseko, 'Reform', 96–102; Ojwang', 'Government', 156; A. M. Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices: 1963–1998* (Nairobi: Zand Graphics Limited, 2012), 43–44; Karume and Gethoi, *Gold*, 57–58; Morris, *Perspectives*, 13.
[51] Berman, *Control*, 208–217; Morris, *Perspectives*, 13; Mamdani, *Citizen*, 10–26.
[52] Owiti and Mbaya, 'Order', 57–67.

land to European settlers. A similar case took place in *Wainaina vs Murito,* to contest the 1915 Crown Lands Ordinance which had been used to declare Africans as tenants on their land. The colonial judiciary dismissed both applications.[53]

During the State of Emergency in 1952 following the Mau Mau uprising, the British style judicial system worked hand in hand with the state to deal with the insurgency.[54] Perhaps the most prominent instance which demonstrated the colonial judiciary's subservience to the colonial executive was during the trial of Jomo Kenyatta and five of his co-accused, the so-called 'Kapenguria Six' for alleged ties to the proscribed Mau Mau grouping. During the trial, the colonial executive recalled British Judge Ransley Thacker, bribed him with £20,000 and had him preside over the partisan trial.[55]

The native courts, on the other hand, were placed under the direct supervision of colonial District Officers (DOs), hence becoming direct appendages of the colonial executive. To make the native courts even more dependent on the colonial executive, the colonial government commenced a series of amendments to the 1907 Native Tribunals Ordinance from 1930. The amendments served to prohibit lawyers from participating in the native courts, justifying this on the basis that their presence in the courts would be disruptive and complicate matters with legal arguments which were irrelevant to Africans.[56]

With the onset of decolonisation after the Second World War, the colonial administration instituted a number of changes to the triple system of justice. This was in response to immense pressure, especially from the newly educated Africans who not only resented the native courts for being run by people they considered illiterate, but also criticised the whole judicial structure as racist. In response, the colonial administration carried out reforms to both the British-style and the native courts within the triple judicial system.[57]

For the British-style system, the colonial administration replaced the administrators within it with professional lawyers. It based these changes on the report of the Bushe Commission,

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[53] Ibid, 67.
[54] Tony Gachoka, 'Charles Njonjo sent me to exile, I am still bitter - Yash Ghai,' *Point Blank*, KTN News Kenya, YouTube, 22:01 https://www.youtube.com/watch?v=8XjqrWfpmZc.
[55] R. Macharia, *The Truth about the Trial of Jomo Kenyatta* (Nairobi: Longman Kenya, 1991); J. Kamau, 'History of Love and Political Hate in the Citadel of Justice', *Sunday Nation*, September 24, 2017, p. 9; Odinga, *Uhuru*, 112–113; 'Dr Willy Mutunga on the rule of law in Kenya, citizenship, nationality and the Third Liberation', *The Elephant*, 10 April 2018, 7.
[56] Morris, *Perspectives*, 13.
[57] Ibid.

which had made recommendations in 1933 advocating for the separation of judicial authority from executive authority.[58] More reform to the judicial system came in the aftermath of the Judicial Advisers' Conference held in Kampala in 1953. The conference recommended the creation of a single judicial system integrating British-style and native courts practices. The colonial government accepted this recommendation and abolished the native courts. It also deepened the separation of the judiciary from the executive by placing the supervision of the judiciary under judicial advisers.[59]

Overall, the colonial judicial system, just like the colonial parliamentary system, contributed little to advance the rule of law during the colonial period. It also had little effect on restraining the colonial administration from excesses. Starting off as a foreign imposition, it worked hand in hand with the colonial executive to subjugate Africans.[60] It had three features, first, a system of individual rights, but which was out of reach for Africans. Secondly, it incorporated African native customs through the Native Tribunal Courts, but in a way that was suited at serving colonial interests rather than to check them. Thirdly, both systems were under heavy control of the colonial executive and were unable to check it. This continued till the decolonisation phase, when pressure from educated Africans forced the death of the native courts and the reform of the entire judicial system.[61]

However, the reform was mostly confined to making the system less racist, rather than strengthening its capacity to check the executive. As such, the reforms improved the system's ability to serve across the racial divide. They did not, however, touch on the question of the judiciary's ability to check the executive. So much so that by the time the colonial administration was coming to its end, the settlers and the departing colonial administration did not put much trust in the checks and balances abilities of the existing judicial system. Instead, they opted to have the Privy Council in Britain take responsibility for enforcing the Bill of Rights which they had written into the Macleod Constitution enacted in November 1960.[62]

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[58] Ibid.
[59] Ibid.
[60] P. Nowrojee, *A Kenyan Journey* (Nairobi: Transafrica Press, 2014), 158–178; Ogot, 'Dominion', 68; M. Awori, *Riding a Tiger: An Autobiography* (Nairobi: Moran Publishers, 2017), 68.
[61] Mamdani, *Citizen*, 10–26.
[62] B. Ibhawoh, 'Asserting judicial sovereignty: The debate over the abolition of Privy Council jurisdiction in British Africa', in *Legal Histories of the British Empire: Laws, Engagements and Legacies*, ed. Shaunnagh Dorsett and John McLaren (London, Routledge, Taylor & Francis Group, 2014), 30–44; Ochieng, 'Kenya', 204.

A third requisite checks and balances institution under the rule of law principles of separation of powers was the political opposition. Under colonial rule, this institution was heavily curtailed especially with regard to African political organisation, and only began to function towards the end of colonial rule. Although there was constant opposition to colonial rule by at least four generations of African movements,[63] it was not until the decolonisation phase that an organised national opposition to colonial rule began to emerge.

In the earlier period of colonial rule, the colonial government mainly used violence to quell the African opposition through punitive expeditions and detentions or exile of leading African oppositionists. In the later periods of colonial rule, the rise of organised nationalist African movements such as Kenya African Union (KAU) led by educated and assertive African nationalists such as James Gichuru and Tom Mboya led to a situation where the opposition began to be effective in restraining the colonial government.[64]

The colonial administration nevertheless attempted to reduce the ability of the emerging African opposition to restrain it. It used two main methods in doing so. First, it penetrated the ranks of the emerging opposition, co-opting some of its members and using them to weaken the rest of the opposition. A case in point was that of the KAU, where it co-opted three of its senior members – Tom Mbotela, Ambrose Ofafa and Mohamed Mudhir, who also doubled up as councillors in the Nairobi Municipal Council. The three became informers for the colonial administration on KAU activities. They were later replaced, and two of them, Mbotela and Ofafa, were eventually assassinated by suspected Mau Mau insurgents.[65]

The second method which the colonial administration used to reduce the capability of the opposition to restrain it from excesses was outlawing opposition activities and deregistering opposition movements. A case in point was the 1953 banning of KAU, incidentally on the recommendation of the union's acting president, W. W. W. Awori, who met the colonial

[63] S. W. Nasong'o. 'Revisiting "the Two Faces of Civil Society" in Constitutional Reform in Kenya' in *Kenya, The Struggle for a New Constitutional Order*, ed. Godwin R Murunga, Duncan Okello and Anders Sjogren (London: Zed Books, 2014), 97–113; Odinga, *Uhuru*, 24–29; Berman, *Control*, 226–246; M. S. Mwangola, 'Leaders of Tomorrow: The Youth and Democratisation in Kenya', in *Kenya: The Struggle for Democracy*, ed. Godwin R. Murunga and Shadrack W. Nasong'o (London and New York: CODESRIA Books, 2007), 142–146.
[64] Goldsworthy, *Mboya*, 19; Maxon, 'Offices,' 46; Odinga, *Uhuru*, 194–196; Morton, *Moi*, 90–107.
[65] O. L. Opiyo, 'Colonial Letters reveal tales of Betrayal and Treachery', *Sunday Nation*, 20 October 2019, 31; Karume and Gethoi, *Gold*, 84–85.

Governor on 6 June of that year and recommended for the outlawing of the movement he headed, arguing that it had become an obstacle to law and order in the country.[66]

Nevertheless, organised African opposition to the colonial administration grew in strength even as the administration restricted its operations. The growth was inspired by three main factors. The first factor involved the increasing numbers of African representatives in important colonial state organs such as the LegCo. These organs provided Africans with a platform with which to challenge colonial rule. An example of such a platform was the AEMO, which was constituted by elected African representatives in the LegCo. The AEMO and its successor CEMO became the basis for African opposition to colonial rule in the LegCo.

The second factor which advanced African opposition to colonial rule was the transformation of small political groupings such as the CEMO into the two mass political movements whose opposition to colonial rule ushered independence into the country. The CEMO, for instance, gave rise to the Kenya Independence Movement (which eventually became KANU) and the Kenya Nationalist Party (which eventually became KADU). These two became national political parties which mobilized masses across the country in the lead-up to Kenya's independence.[67]

The third factor which helped build effective opposition against colonial rule involved constitutional changes which commenced in 1954 under the Lyttleton Plan. The changes gradually removed the restrictions on African political mobilisation such that by 1963 with the enactment of the Maudling Constitution, African opposition had become so strong that it took over government from the colonial administration.[68]

As a checks and balances system, elections suffered a fate similar to such other institutions under colonial rule. Much like many other checks and balances institutions, elections were introduced in 1920. Yet like the other checks and balances institutions, the electoral system was split along racial lines. The first system consisted of elections to choose representatives to the LegCo as a national organ. This system was confined to non-indigenous groups.[69] The second system consisted of elections at the local level to choose representatives into the

[66] Opiyo, 'Letters'.
[67] Goldsworthy, *Mboya*, 140–146; Odera, *Confidant*, 31; Maloba, 'Nationalism', 173–193.
[68] Ojwang', 'Government', 151–152.
[69] Ogot, 'Dominion', 53; Berman, *Control*, 398–399; J. Willis, G. Lynch and N. Cheeseman, 'Voting, Nationhood and Citizenship in Late-Colonial Africa', *The Historical Journal Cambridge* (2018): 5–6.

LNCs/ADCs. This system was confined to indigenous populations and was heavily controlled by the Provincial Administration.[70]

It was not until 1957 that the electoral system underwent significant changes which removed the racial divisions within it and extended the universal suffrage inherent in the first system to indigenous populations. This came about as a result of two main factors. First, constitutional changes beginning with the Lyttleton Plan in 1954 which increased the number of African representatives in the LegCo required the extension of electoral rights to African voters to facilitate the choice of their representatives into the LegCo. Secondly, the Coutts Committee report recommendations released in 1956 in response to the Lyttleton Plan provided a criterion for participating in elections as a voter in Kenya.[71] Following the changes, the first elections in which African populations voted for their representatives into the LegCo took place in 1957.[72]

The adoption of the Macleod Constitution in November 1960 further consolidated changes to the colonial electoral system. The constitution allowed Africans to participate in the first nation-wide elections beyond determining their representatives to the LegCo. This was boosted by the emergence of the two major national political parties, KANU and KADU. The two parties availed to Africans the opportunity to choose a political party at the national level which they wished to have govern the country.[73]

With the gradual growth in the importance of elections as a checks and balances mechanism, the colonial administration used the influence it had over the management of the electoral process to reduce the ability of the elections to restraint it from excesses. In addition to tightening the direct control which the administration wielded over the electoral system at the local level, it extended the control to national elections, even as it made changes to extend universal suffrage to Africans. [74]

Two cases stand out as examples to this extent. The first case involved the elections of May 1961 which pitted KANU against KADU for the first time. In the elections, the Governor Patrick Renison openly campaigned for KADU, considering it more moderate than KANU.

[70] Morton, *Moi*, 72; also 218–219; Osogo, 'Day'.
[71] Odinga, *Uhuru*, 137; Willis, Lynch and Cheeseman, 'Voting', *The Historical Journal Cambridge*, 12–13.
[72] Berman, *Control*, 398–399; Willis, Lynch and Cheeseman, 'Voting', *The Historical Journal Cambridge*, 5–6.
[73] Goldsworthy, *Mboya*, 181–190.
[74] Willis, Lynch and Cheeseman, 'Voting', *The Historical Journal Cambridge*, 20–21; Odinga, *Uhuru*, 221.

This tilted the electoral management system in favour of KADU.[75] The second case involved the 1962 referendum on the Northern Frontier District (NFD). Although an overwhelming majority of NFD residents voted to have region secede from Kenya, Governor Malcolm McDonald rejected the outcome. This demonstrated the extent to which electoral outcomes did not depend on voting but rather on preferred outcomes of the colonial administration.[76]

Within the colonial executive, there was one institution which was set up to promote the interests of indigenous Africans. This was the Native Affairs Commission. Although not indicative of a separation of powers in accordance with the rule of law principles, the Commission attempted to offer some mild restraint on both the colonial administration and white settlers' excesses against Africans. The Commission was set up in 1914 as part of the colonial Executive Committee (ExCo), with a Chief Native Commissioner as its head. It was initially responsible for supervising how the Provincial Administration governed Africans within native reserves. Its creation came about due to pressure from British humanitarian agencies, charities and church-affiliated bodies, which demanded its creation as a means of representing Africans within colonial policy circles.[77]

The Commission was vigorously opposed by white settlers, and they attempted to have it abolished in 1922 and also in 1928. However, they failed due to fear of the repercussions this would have brought from the UK. Nonetheless, the settlers succeeded in reducing the Commission's power, taking away its function of supervising the Provincial Administration in African native reserves and reducing it to an adviser on native affairs to the colonial Governor. In reducing its power, the settlers argued that the institution had created a parallel centre of power in having provincial administrators report both to it and to the Governor. It was also often used by white settlers to push policies favourable to them such as forced labour and taxation of Africans.[78] During the decolonisation phase, it was designated as the Ministry of Community Development and African Affairs and Africanised by being handed to Beneah Apollo Ohanga, the first indigenous Kenyan to join the ExCo in 1955.[79]

Hence as a rule of law principle, checks and balances were mostly absent during much of the colonial period. Colonial rule itself was characterised by the replacement of indigenous

[75] Odinga, *Uhuru*, 220; Mboya, *Freedom*, 45.
[76] J. Kamau, 'Wafula Chebukati's litmus test and our buck passing', *Sunday Nation*, 10 September 2017, 32.
[77] Berman, *Control*, 84–85.
[78] Mboya, *Freedom*, 48.
[79] Berman, *Control*, 66.

institutions with metropolitan ones, the most dominant of which was the executive. It was also characterised by the repurposing of indigenous institutions in order to make them serve colonial interests. This arrangement was initially checked by the British parliament and other metropolitan institutions.[80] Gradually, white settlers in Kenya developed a system of local checks and balances to replace the metropolitan one. However, the system reinforced white settler dominance and increased the excesses of colonial rule against Africans. It was only later, particularly after the Second World War, that Africans began to gradually get accommodated in the emerging system of checks and balances. One such case involved the appointment of Eliud Mathu as the first African representative in the LegCo in 1944. Increased pressure for decolonisation modified the colonial system to the extent that by 1963 a strong system of checks and balances had emerged. However, this was a case of too little too late since the colonial administration came to an end shortly after embracing constitutional rule in 1963.

Due Process under Colonial Rule

Much like the rule of law principles of universal rules for everyone and a separation of powers, the principle of due process was missing under colonial rule in Kenya. This can be attributed to two factors which were prevalent during the colonial era. First was the widespread violence which the colonial administration deployed to overcome African opposition to colonial rule. The violence was perpetuated by the colonial executive either without reference to the colonial judiciary or with its complicity. The violence fell into two types. The first type consisted of 'foundational violence' and took place in the early years of colonial rule. It was perpetrated during the founding of the colonial state and its purpose was to help the colonial administration impose itself on indigenous populations.[81] A well-documented case of foundational violence at play can be glimpsed in the October 1905 assassination of the Nandi leader Koitalel arap Samoei by the British soldier Richard Meinhertzhagen for having led the Nandi to resist colonial rule.[82]

The second type of violence perpetrated by the colonial administration was 'maintenance violence.' This type of violence occurred throughout the entire period of colonial rule once the colonial state had been founded. It was meant to help the colonial administration retain its

[80] Berman, Ibid, 79; Lonsdale, 'Conquest', 23–24; Zeleza, 'Rule', 35.
[81] A. Mbembe. *Postcolony,* 24–65.
[82] Lonsdale, 'Conquest', 6–11; Karume and Gethoi, *Gold*, xviii-xx; Atieno-Odhiambo, 'Prophecy', 7–8; Ogot, 'Invention', 24.

dominance over Africans. Instances of 'maintenance violence' during the colonial era occurred in places such as Musanda in Western Kenya and Lari in central Kenya, where the colonial forces massacred Africans for opposing some of the colonial administration's policies, especially on land evictions to create room for white settlers or African loyalist groups.[83]

The second factor which militated against due process during the colonial period was the lack of a competent and independent judiciary to enforce it. The colonial judiciary was characterised by three features which made it unable to enforce due process. First, it was fragmented into three, with British, sharia and native versions, each of which dispensed with the law, but on the basis of racial difference, rather than justice and due process.[84] Secondly, the British and native segments of the judiciary were heavily dependent on the colonial executive. Whereas the Native Tribunals were under the direct supervision of the colonial provincial administrators, the British system of courts was managed and run by the colonial executive.[85] Thirdly, even with reforms in later years of colonial rule which led to a single system of justice in the country, the judiciary remained an appendage of the executive and never acquired the requisite independence from the executive to enforce due process.[86]

The absence of due process and the other rule of law principles led to impunity, which manifested itself in two main ways during the colonial period. First, this was through the existence of dual systems of representation and access to justice based on racial categories. In representation, whereas white settlers and other non-indigenous groups enjoyed the services of the more assertive LegCo, indigenous Africans were confined to the LNCs. In access to justice, whereas the non-indigenous groups enjoyed the services of the better-resourced British system of law, Africans were subjected to Native Tribunals and customary law.[87]

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[83] A. Okoth, *A History of Africa: African Nationalism and the Decolonisation Process* (Nairobi, East African Educational Publishers, 2006); Berman, *Control*, 58–69; Odinga, *Uhuru*, 15–16; Mboya, *Freedom*, 48; Elkins, *Gulag*, 34–35; J. Kamau, 'How chief's murder triggered the colonial state of emergency', *Sunday Nation*, 11 October 2020, 29; J. Kamau, 'Dedan Kimathi was shot as he rested under a tree', *Daily Nation*, 24 August 2020, 31; J. Kamau, 'How colonial jailers blocked attempts on Kenyatta's life', *Daily Nation*, 20 October 2015, 31; K. Ngotho, 'Lari massacre: Loyalists targeted by Mau Mau army', *Sunday Nation*, 15 December 2019, 29.
[84] M. K. Mbondenyi, 'Unclogging the Wheels of Justice: A Review of Judicial Transformation in the Post-2007 Period', in *Human Rights and Democratic Governance in Post-2007 Kenya: A Post-2007 Appraisal*, 328–330.
[85] Cockar, *Doings*, 43–44; S. Nyachae, *Walking through the Corridors of Service: An Autobiography* (Nairobi: Mvule Africa Publishers, 2010), 57–58.
[86] Ojwang', 'Government', 156; Shah, 'Politics of the law'; J. Kamau, 'Citadel'; Morris, *Perspectives*, 13.
[87] Berman, *Control*, 208–217.

The second manifestation of impunity was witnessed in the light punishments which European convicts received compared to Africans in similar situations. A good example of this involved an African suspect under police custody, one Kimani Ngethe. Ngethe had been arrested by Barry Harvey Hayward, a European intelligence officer in the colonial police service. Hayward was assisted by an African informer called Gucho Githongo. In the process of extracting information, Hayward and Githongo tortured Ngethe, causing him serious bodily harm. They were prosecuted for the crime. However, in a manifestation of the unequal treatment of Africans and Europeans, on 3 April 1954, the presiding judge, J. L. Mcduff fined Hayward £25, while making Githongo serve two years hard labour in prison.[88]

2.3 Colonial Administration and Vertical Accountability

In colonial Kenya there were at least three important actors from organised society who offered restraint on the colonial administration. These were faith-based organisations, the media and labour unions. Although these actors differed in the mechanisms and strategies they employed and did not explicitly demand for specific principles of the rule of law such as constitutionalism, checks and balances and due process, they collectively worked to restrain the colonial administration from excesses. Within faith-based organisations, the church was a prominent and powerful member. The colonial administration's relationship with the church was characterised by several features. First, there was a clear distinction between mainstream and indigenous churches. Whereas the mainstream churches catered mostly to the settlers and reached out to Africans as missionaries, the indigenous churches were African-led and catered to the needs of indigenous congregations.[89]

The second feature marking the relationship between the church and the state in colonial Kenya was in terms of the relationship that was cultivated between, first the mainstream churches and the colonial administration, and second, between indigenous churches and the colonial administration. Between mainstream churches and the colonial state, the relationship swung between ambivalence and cordiality. Cordiality was characterised by friendly relations between the colonial administration and the mainstream churches. It was witnessed during various phases of the colonial era.

In the early years when the flag followed the cross, the mainstream churches needed the state's protection and patronage to penetrate the African interior and carry out missionary and

[88] N. Gisesa, 'How NIS regained Uhuru's trust and confidence', *Sunday Nation*, 19 January 2020, 9.
[89] Atieno-Odhiambo, 'Prophecy', 11–13; Odinga, *Uhuru*, 65–66; Mboya, *Freedom*, 20–22.

humanitarian work. Later as the colonial administration established itself across the country, the mainstream churches helped the colonial administration overcome African resistance to colonial rule by trying to steer nascent African groups away from resistance, as was witnessed in Kavirondo under the influence of Archdeacon Owens Walter Edwin.[90] Towards the end of colonial rule, mainstream churches maintained silence in the face of excesses by the colonial government as it cracked down on the Mau Mau insurgents.[91]

In terms of ambivalence, this was characterised by mutual suspicion between the colonial administration and the mainstream churches. The main source of friction between the colonial administration and the mainstream churches was initially centred around the functions of the Native Affairs Commission. The Commission was established in 1914 as part of the colonial ExCo. The church was not only responsible for the pressure which led to the setting up of the Commission, but also provided the membership which ran it, with the Commission's first Native Affairs Commissioner being Reverend H. R. Montgomery, a white church leader. In addition, the church ensured the continued existence of the Commission even as pressure from white settlers for its abolition mounted. Such was the church's support for the Commission that by 1923, it had ensured its entrenchment as part of the recommendations of the Devonshire White Paper, which declared Africans' interests (as opposed to those of white and Asian settlers) as paramount in the colony.[92]

Besides protecting the Native Affairs Commission, the church also assigned itself the role of representing Africans in the emerging colonial institutions, the most prominent of which was the LegCo. Among mainstream church leaders who represented African interests in the LegCo were Reverend Canon Leakey, Archdeacon Owens Walter Edwin, L. J. Beecher and Reverend Canon George Burns. The church's representation of Africans in the LegCo continued even after the appointment of Eliud Mathu as the first indigenous African to join the institution in 1944. Mainstream churches also spoke against some of the most egregious policies of the colonial administration. This started after the First World War, when the colonial administration, under the influence of white settlers, began enacting measures aimed at expropriating resources and labour from Africans. For instance, in 1919 when Governor Northey promulgated a policy of forced labour for Africans, the Alliance for Protestant

[90] Maxon, 'Advance', 102.
[91] S. W. Nasong'o, 'Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition', in *Kenya: The Struggle for Democracy*, 27.
[92] Maxon, 'Offices', 41–42; Ogot, 'Dominion', 54–55; Elkins, *Gulag*, 91–93; Awori, *Tiger*, 43.

Missions protested the measure through its Secretary J. H. Oldham. A leading mainstream church figure critic of colonial measures against Africans was Arthur Barlow of the Church Missionary Society, who wrote letters to London opposing the measures.

After the Second World War, there was increasing change in the leadership of the mainstream churches. This led to having the churches taken over by African figureheads, starting with the 1955 consecration of Festo Olang and Obadiah Kariuki in the Anglican church and the 1957 consecration of Maurice Otunga as the auxiliary bishop of Kisumu Diocese of the Catholic Church. These African figureheads pulled the mainstream churches further towards opposition to colonial rule administration and support for African independence, thus furthering the ambivalence between mainstream churches and the colonial state.[93]

As for the relationship between the colonial administration and the indigenous churches, besides it being characterised by mutual suspicion and hostility, there was the added element of direct conflict and confrontation. The main trigger of the hostility was the indigenous churches' deliberate efforts to pull Africans away from the ideas promoted by mainstream churches and schools, emphasising more on African independence.[94] The consequences of the hostility for indigenous churches were dire. A number of indigenous church leaders were either placed in detention or sent to exile away from their home areas.[95]

One of the indigenous churches which paid a high price for its stance against colonial rule was the African Independent Pentecostal Church of Africa (AIPCA), one of the most active indigenous churches in preaching African independence in central Kenya. In 1952, AIPCA lost about 327 properties including churches and schools, which were confiscated by the colonial administration at the height of the State of Emergency. In confiscating the properties, the administration claimed that the AIPCA was using them as a staging ground for resistance against the state. The administration handed the properties to mainstream churches and banned AIPCA.[96] There were also numerous incidents of direct confrontation between the colonial security forces and members of African indigenous churches. One such

[93] 'Church Influence before Independence', *Kenya Yearbook 2010,* Kenya Editorial Board, Government of Kenya http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 06/07/2020).
[94] Atieno-Odhiambo, 'Prophecy', 11–13; M. G. Gecaga, 'Religious Movements and Democratisation in Kenya: Between the Sacred and the Profane', in *Kenya: The Struggle for Democracy*, 63–68.
[95] Maxon, 'Advance', 84.
[96] Odinga, *Uhuru,* 67–75; J. Kamau, 'Will Uhuru succeed where Jomo failed in reversing ownership of Church schools?' *Sunday Nation,* 25 November 2018, 29.

confrontation resulted in the Kolowa massacre of 1940 against members of the New Jerusalem Church of Dini Ya Roho Mafuta Pole Afrika based in West Pokot and led by Lukas Pkiech.[97]

A second important source of vertical accountability on the colonial administration was the labour movement. Starting off as an exclusive sphere for Indian workers, the movement was numerically boosted when African workers began joining it from around 1933. The first recognised organisation was the Labour Trade Union of Kenya (LTUK) in 1933. It later changed its name to Labour Trade Union of East Africa (LTUEA) and was formally registered in September 1937.[98] With the support of African workers, the labour movement gave birth to some of the figures who eventually formed the core of the Kenyan nationalist movement, among them Tom Mboya, Fred Kubai and Arthur Ochwada. It also facilitated the emergence of outstanding personalities who used it as a platform to challenge colonial policies. Three of these personalities were Mboya, Chege Kibacia and Makhan Singh.[99] Whereas Mboya set up the Kenya Federation of Labour (KFL) and used it for open political activity by affiliating the federation to KAU, Kibacia and Singh used industrial strikes to challenge the excesses of colonial rule. In 1947, for instance, Kibacia led a strike which agitated for better working conditions for Africans.[100] The colonial administration's response to African trade unionism involved actively discouraging the growth of the movement as well as jailing or exiling labour leaders.[101] Both Kibacia and Singh were tried and sentenced for their role in industrial strikes, while Kubai was accused during the trial of the so-called Kapenguria Six, of using his position as a labour leader to support KAU and Mau Mau.[102]

A third important source of restraint from below was the media. Like the faith-based landscape, there were two main categories of media – mainstream and indigenous. Among the mainstream, the first newspapers in Kenya were *The East African* and *Uganda Mail*, both published in Mombasa. They were followed up by *The African Standard*, set up by A.M. Jevanjee in 1902. Soon, *The African Standard* became *The East African Standard,* and in the

[97] Oscar Kakai, 'Ever heard of Pokot's "New Jerusalem Dini Ya Roho Mafuta Pole Afrika" church?' *Daily Nation*, 5 November 2020, 24.
[98]Akuma and Chacha, *Atwoli*, 24–27.
[99] Zeleza, 'Second World War', 168; Berman, *Control*, 326; Magaga, 'Dream', 87; Akuma and Chacha, *Atwoli*, 5–6.
[100] Mboya, *Freedom*, 36–38; Berman, *Control*, 390–395.
[101] Akuma and Chacha, *Atwoli*, 25–28.
[102] Owiti and Mbaya, 'Order', 45; Goldsworthy, *Mboya*, 11–29; Awori, *Tiger*, 34; K. Ngotho, '"Mad Indian" and unionist: Two forgotten First Liberation heroes', *Sunday Nation*, 12 July 2020, 9; *The Nairobian*, 'Fred Kubai: The secretive freedom fighter', 12 December 2018, 9.

postcolonial era *The Standard*.[103] Generally, mainstream media was considered as representative of both settler interests and colonial government policy. For instance, the editor of *The East African Standard,* W.H. Tiller mostly signed off his editorial with 'Yours Responsible Editor', showing the subservient and complementary relationship the newspaper cultivated with the government. On the other hand, the Nation Media Group, which grew to become Kenya's largest media outlet was established towards the end of colonial rule, and therefore did not contribute much to the media landscape during the colonial era.[104]

Among the indigenous newspapers, the first publication was *Muigithania* (the Peacemaker), for which Jomo Kenyatta worked as editor. Set up mainly to articulate African issues, the indigenous media was critical of colonial government policy.[105] This in turn led to a hostile reaction from the colonial government. The government not only arrested and jailed pioneer African journalists as was the case with Henry Mworia, but also ensured disappearance and inaccessibility of information regarding its activities during the State of Emergency period.[106]

As can be deduced from the foregoing, the colonial era was characterised by a lack of respect for the rule of law and state restraint. Numerous excesses against Africans were witnessed in the political, social and economic spheres. The colonial system of checks and balances comprising of the judiciary and the LegCo not only failed to provide a solution, but also helped the colonial government perpetuate excesses. Granted, a few institutions provided some mild form of checks and balances. Particularly in the early phases of colonial rule, some mild restraint came from metropolitan institutions in London, which provided checks and balances to the colonial administration as part of checking the UK executive.

As the colonial administration settled down to govern Kenya, some local institutions which could provide further checks on the administration sprang up. One of these institutions was the Native Affairs Commission which was set up within the colonial executive to protect

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[103] P. O. Ochillo and P. Wanyande, 'The Media in Political Transition', in *Governance and Transition Politics in Kenya*, ed. Peter Wanyande, Mary Omosa and Chweya Ludeki (Nairobi, University of Nairobi Press, 2011), 121.

[104] S. Durrani, *Never Be Silent: Publishing and Imperialism in Kenya – 1884–1963* (London: Vita Books, 2006), 30-36; J. Kadhi and M. Rutten, 'The Kenyan Media in the 1997 Elections: A Look at the Watchdogs', in *Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya*, ed. M.M.E.M. Rutten, A. Mazrui and F. Grignon (Leiden: African Studies Centre, 2001), 243; Goldsworthy, *Mboya*, 40; Mboya, *Freedom*, 100.

[105] Durrani, *Silent*, 44–50; Odinga, *Uhuru*, 109–111; Awori, *Tiger*, 35.

[106] K. Ngotho, 'How media and State can end "enmity"', *Daily Nation*, 10 February 2018, 32; I. Cobain, 'Government admits "losing" thousands of papers from National Archives', *The Guardian*, 26 December 2017, https://www.theguardian.com/uk-news/2017/dec/26/government-admits-losing-thousands-of-papers-from-national-archives (accessed 11 October 2021).

African interests, following pressure from the mainstream church and humanitarian agencies. However, the institution was reduced into an advisory role for the colonial governor and could not provide effective checks on excesses against Africans by both settlers and the colonial administration. Much of the restraints against the administration therefore came from outside the colonial state itself, namely from vertical accountability actors. These consisted of the church, the labour movement and the media. However, a common characteristic among the vertical actors was the fact that only those sections controlled by indigenous populations were active in challenging the colonial administration's excesses, with mainstream sections controlled by non-indigenous groups remaining largely silent. It was under these general circumstances that the colonial-era LSK operated. The question to ask therefore is whether the LSK was an enabler of the excesses of the colonial administration like most other formal institutions of the colonial era or it attempted some restraint, like the Native Affairs Commission? The next section considers this question.

2.4 LSK and the Excesses of the Colonial Administration

The LSK, as the vertical accountability entity whose primary means for fighting state excesses is the rule of law, was expected to use the means in responding to the numerous excesses of the colonial administration. The organisation was expected to specifically focus on promoting the three cardinal principles of the rule of law. These were: first, existence of rules to which everyone is subjected; secondly, existence of a system of checks and balances; and thirdly, respect for due process. The question then is, did the LSK respond to the excesses of the colonial administration in respect of these three cardinal principles? This section examines LSK's performance to this extent.

The precise year of the LSK's formation is indeterminate. Nonetheless, existing accounts place the origins of the organisation to a period prior to 1910. Its formation was closely linked to the presence of the Kenya High Court in Mombasa, which served as Kenya's administrative capital at the time. When the capital shifted to Nairobi in 1910, the High Court also shifted to Nairobi. With the High Court in Nairobi, lawyers in the city formed the Nairobi Law Society. This led to Kenya having two bar associations for the next decade, with Mombasa retaining its original association as the Law Society of Mombasa, while Nairobi built up its own association.[107] The Nairobi and Mombasa Law Societies merged in the early

[107] KNA/AP/1/903 (b), Folio 38/42/14/1, Correspondence from Sir Robert Hamilton, Secretary of the Nairobi Law Society to the Chief Justice, 03/05/1919.

1920s to form the LSK. However, while the Nairobi Law Society took on a national outlook as the LSK with representatives from all across the country, the Mombasa association remained in existence as a voluntary body, although it had representatives in the LSK.[108]

It was not, however, until 1949 that the LSK received legal recognition. This was through the LSK Ordinance of 1949, which was enacted by the colonial administration. The recognition made it establish a formal structure. Within this structure, Humphrey Slade, a member of the LegCo and later Speaker of independent Kenya's National Assembly from 1967 to 1970, became its first widely recognised chairperson between 1949 and 1950. After Slade, the LSK consistently got new chairpersons every year for the rest of the colonial period. Among these were N.S. Mangat (1950–1951), L. Kaplan (1951–1952), J. Sorabjee (1952–1953), C. F. Schermburucker (1953–1954), J. M. Nazareth (1954–1955), Ivor Lean (1955–1956), Chunilal Madan (first stint – 1956–1957), J. A. Mackie-Robertson (1957–1958), Chanan Singh (1958–1959), J. O. O'Brien Kelly (1959–1960), Chunilal Madan (second stint – 1960–1961), A. E. Hunter (1961–1962), Satish Gautama (1962–1963) and Justice Harris (1963–1964).[109]

The early years of the LSK were focused on bureaucratic court procedures. This may have had some effect in promoting the due process principle of the rule of law. For instance, prior to the merger with the Mombasa Law Society, the Secretary of the Nairobi Law Society wrote to the Chief Justice in early 1920, requesting for interpreters and room for interaction between defence lawyers and accused persons as well as more time for its members to attend courts summonses. The secretary demanded that the summonses should be cognisant of travel distances when issued to lawyers and their clients. Apparently, courts issued summonses without lawyers adequate time to respond to them. The LSK felt that this was affecting its ability to dispense justice.[110]

Another case of LSK promoting due process was in March 1936, when the organisation picked up the issue of access to lawyers for accused persons. Through its Secretary Edward Barret, the organisation wrote to the Registrar of the Supreme Court of Kenya, demanding for provision of legal aid to poor defendants, a majority of whom were African. Besides asking for access to lawyers, the Secretary also repeated the earlier request to have government

[108] Ghai and McAuslan, 'Public', 87; N. Cox and T. O. Ojienda, *The Enforcement of Professional Ethics and Standards in the Kenyan Legal Profession* (Nairobi: The World Bank and The Law Society of Kenya, 2010), 84.
[109] The Law Society of Kenya Website: www.lsk.or.ke.
[110] KNA/AP/1/903, (b), Correspondence between the Secretary of the Nairobi Law Society and Acting Chief Justice, T. D. Maxwell, 12/04/1920.

provide accused persons with interpreters and rooms as well as adequate time for consultations between the accused and their lawyers.[111]

Apart from these cases, there are no other instances of LSK working to enhance either additional aspects of due process or the other principles of the rule of law. Throughout the colonial period, the LSK was not on record putting the colonial administration under pressure in pursuit of either existence of rules to which everyone, including the colonial administration was subject, or checks and balances. Instead, it ignored these principles. A striking instance of LSK maintaining silence in the face of violation of the rule of law can be glimpsed in the correspondence on 26 November 1927 from the Chief Native Affairs Commissioner to the organisation. In the correspondence, the Commissioner wrote to the LSK requesting it to support the Commission stop a habit where Africans who had served jail sentences were again made to pay fines for the crimes for which they had already served. In his letter, the Commissioner argued that this was against English law and demanded that the habit be expunged from the Criminal Procedure Ordinance to allow for either serving a sentence or payment of a fine, and not both. There was no indication, however, that the LSK enjoined itself in this matter.[112]

Generally, the LSK confined itself to bureaucratic procedures within the precincts of the law courts and largely desisted from confronting government on the broader question of the rule of law in the face of colonial state excesses. This was the case despite the numerous excesses against Africans at the time. In all the recorded reactions to the excesses of the colonial administration by societal groups in colonial Kenya, a notable conspicuous absence is the LSK.

Instead, the task of helping restrain the colonial administration often fell on individual LSK members without the organisation's support. Among these included Isher Dass, a lawyer of Indian descent, who offered support to the 1938 Kamba protest led by Ukamba Members Association (UMA) under Muindi Mbingu against forceful destoking of their livestock. Dass took up the UMA protest against the destocking policy, opposing it on the floor of the LegCo. The second individual LSK member to take on the colonial authorities was Makhan Singh, another lawyer of Indian descent. Singh led a strike in 1950, agitating for better working

[111] KNA/AP/1/903 (b), Folio 1/52/10/29, Correspondence from the Law Society of the Colony of Kenya Secretary Edward Barret to the Registrar of the Supreme Court of Kenya, 05/03/1936.
[112] KNA/PC/NZA 3/17/1, Folio 13, Correspondence between the Chief Native Commission G. V. Maxwell and the Colonial Secretary through the Attorney General, 26/11/1927.

conditions for Africans. He was subsequently tried by the colonial judiciary, sentenced to jail and exiled.[113]

The third case of individual lawyers fighting for the rule of law involved C. M. G. Argwings-Kodhek. Being Kenya's first indigenous African lawyer, Argwings-Kodhek's fate was an illustration of the challenges and opportunities which indigenous lawyers faced in practising law under colonial rule. Due to lack of legal education opportunities in the country, he had been forced to seek legal training outside the country, and only returned after gaining his qualification in 1952. His return coincided with the State of Emergency, which involved a clampdown on suspected Mau Mau adherents. Argwings-Kodhek responded to this situation by establishing the first indigenous-owned law firm and through it, offered legal services to Mau Mau suspects. He also challenged the segregation laws of the colonial administration which prohibited intimate relations between Africans and Europeans. When news of the Hola Massacre broke out in 1959, Argwings-Kodhek used the networks and connections he had built while undertaking his legal studies to expose the Massacre to a wider international audience, including having it debated in the UK parliament. The exposure precipitated a crisis in the colonial administration, leading it to convene the first Lancaster House Conference in January 1960.

Argwings-Kodhek was also active in decolonisation politics. He formed the Kenya African National Congress (KANC), which was refused registration by the colonial government owing to the nationalistic intentions implied in the name. This forced him to change the party's name to Nairobi District African Congress (NDAC), which he used to contest as Nairobi's representative to the LegCo. However, he lost the contest to Tom Mboya who ran on the People's Convention Party (PCP) ticket. In May 1960 Argwings-Kodhek dissolved NDAC and joined KANU. He was then elected as Member of Parliament (MP) for Gem Constituency in Nyanza. As a legal practitioner and MP, Argwings-Kodhek attended the Lancaster House conferences as one of KANU's legal advisors. He later served in the Independence government first as deputy minister and later as minister before his death in a car accident on 29 January 1969 in Nairobi.[114]

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[113] Okoth, *A History*; P. Ndege, 'How colonial legacy made KMC bite off more than it could chew', *Daily Nation*, 12 September 2020, 8; Kanogo, 'Kenya', 129.

[114] 'Mau Mau lawyer, C. M. G. Argwings-Kodhek', *Kenya Yearbook 2010*, Kenya Editorial Board, Government of Kenya http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 6 July 2020); Kamau, 'Argwings-Kodhek'.

Outside the LSK, there were also instances of campaigns by the African representatives in the LegCo, when it was expanded to accommodate them under the Lyttleton and the Lennox-Boyd constitutions, for the legal profession to accommodate African interests. Speaking on the floor of the LegCo in 1956, for instance, W. W. W. Awori demanded for increased legal education opportunities for African students. This was against colonial government policy, which, due to fear of giving Africans legal skills, had discouraged legal education for them. Besides Awori, Julius Gikonyo Kiano, another African representative in the LegCo, also speaking in 1956, upbraided the legal profession for the quality of legal aid which was being offered to Mau Mau suspects facing capital offences. This brought out a spirited response by Chunilal Madan, who was then the junior Minister for Commerce and Industry in the colonial government as well as the LSK president. His response amounted to a defence of the lawyers' professional integrity, dismissing Gikonyo's concerns.[115]

Overall, the legacy of LSK in promoting the principles of rule of law and restraining the colonial state from excesses is dismal. The reasons for this can be categorised into two: internal and external. Ghai and McAuslin supply both. Starting with internal reasons, the two authors argue that the racial composition of the LSK made it impossible for the organisation to fight for the rule of law, which would have protected African rights. The organisation's leadership rotated only among Europeans and Asians. It was not until 1970 that Sam Waruhiu became the first African LSK president. Secondly, a majority of LSK members were confined to Nairobi and Mombasa and had no contact with the rest of the country, where majority of Africans lived.[116]

Externally, although the colonial administration had consistently enhanced LSK's powers since the organisation was legally recognised in 1949, it remained unconcerned about African rights. Instead, LSK relegated issues of African legal rights to the native tribunals. It even failed to engage in the reformation of the tribunals by staying away from both the Bushe and Phillips Commissions of 1933 and 1944 respectively.[117]

It was not until the 1957 amendments to the Advocates Ordinance that LSK began to show interest in African legal issues. The amendments created a fairly favourable environment for Africans to study law. However, LSK's interest was largely artificial, more out of the need to

[115] Shah, 'Politics of the law'.
[116] Ibid; Ghai and McAuslan, 'Public', 87.
[117] Ghai and McAuslin, Ibid.

survive the decolonisation pressures of the late 1950s and early 1960s than genuine interest in developing an indigenous cadre within the legal profession. Thus as an organisation, LSK was not keen on advancing the legal profession as a means of upholding the rule of law and countering colonial government excesses.

2.5 Colonial State's Reactions to LSK

Like most institutions which emerged in the early colonial era, the LSK was a transplant of a British institution into Kenyan soil. It therefore had many similarities with Kenyan institutions which emerged at the time, such as the judiciary and the LegCo. These institutions cultivated a relationship of mutual dependence with the colonial executive, on which they relied for their operational survival. At the emergence of the legal profession, the colonial administration discouraged lawyers from organising themselves into a bar association. Nevertheless, the lawyers organised informally into a yet-to-be officially recognised LSK and began to send delegations to the colonial administration from 1935. The purpose of the delegations was to argue for the elevation of the lawyers' association into a statutory body and its organisation along the lines of the English Law Society. The colonial administration responded to these early pressures by forming a committee to consider the requests from the delegations. The committee produced its findings and recommendations in 1938. However, due to the outbreak of the Second World War in the following year, the recommendations were shelved until 1949.[118]

Prior to the official recognition of the LSK in 1949, much of its interaction with the colonial government was confined to development of minor regulations for the profession, which was placed in the hands of a senior judge of the Kenya High Court. The judge had the power to license any persons to practice even if they were not lawyers, so long as they were of good character and adequate capability. Overall, however, the profession remained loose, with entry remaining open even to untrained individuals.[119]

One of the early regulations enacted for the profession was the Legal Practitioners Ordinance of 1906, which introduced measures for regulating entry into the profession. The Ordinance confined the practice of law to notaries public and those persons who had been enrolled before the Indian High Court. The Ordinance was amended in 1911, 1926 and 1929, with all the amendments consolidating restrictions of the profession to trained lawyers. The 1911

[118] Ibid.
[119] Ibid, 86.

amendment expanded the legal profession to permit lawyers from the UK and self-governing British dominions to practice in the Kenya Colony. It also empowered the Crown Advocate (later called the Attorney General) and clients aggrieved by a lawyer's conduct to institute disciplinary action against the offending lawyer. The 1926 amendment introduced a requirement for anyone wishing to practice in Kenya to have been a resident in the country for at least six months. In 1929, the main change introduced by the amendment was the insertion of penalties and prohibitions for those who acted as lawyers without the requisite qualifications.[120] The 1929 amendments remained operational until 1949.

An important feature of the legal profession during the colonial period was its racial composition. Whereas both Europeans and Asians were dominant in the legal profession, membership to the early LSK was open only to Europeans. Whereas Europeans, especially those from England were dominant in government, Asians were dominant in the private legal sector, serving mostly the white settler clientele.[121] In both cases, there was little interaction between the legal profession and the LSK on the one hand, and between the profession and Africans on the other hand.

For Africans, participation in the legal profession had been suppressed by the 1907 Native Tribunals Ordinance, which confined Africans to a separate judicial system. The Ordinance was consolidated in 1930, further alienating Africans from the British judicial system. The LSK was not involved in either the establishment or amendment of the Native Tribunals Ordinance, perhaps a demonstration of the organisation's disinterest in the legal needs of the African population.[122]

The most transformative changes in LSK came in 1949. They resulted from pressure which lawyers exerted on the colonial administration through such white settler lobbies as the Electors' Union, which came up with the Kenya Plan in 1949, and which, among other things, demanded that appointments to the Kenya judiciary be restricted to lawyers who had been in private practice in the East African courts of law.[123] Responding to the pressure, the colonial administration packaged the changes demanded by the LSK into two laws that were enacted simultaneously in 1949: the Advocates Ordinance and the Law Society of Kenya Ordinance.

[120] Ibid, 87.
[121] Ibid, 85–92.
[122] Ibid, 88.
[123] B. A. Ogot, 'Dominion', 65.

The provisions from the two laws covered various aspects, starting with the legal standing of the LSK, which they transformed into a statutory body. Perhaps the most important provision from the two laws was to assign to the LSK the distinctive role of protecting the rule of law for the first time in the country. In addition, the two ordinances empowered the LSK to regulate entry into the legal profession, vet entrants into the profession and maintain and uphold its standards. Other roles delegated to the LSK included protecting the operating environment for the legal profession and assisting members of the public to access legal services. In terms of governance, the two laws assigned the LSK self-governing powers vested in an LSK council. The council consisted of a president and six other persons elected at an annual general meeting. At this initial stage, the LSK president was elected by the council, and not by members directly. Despite the empowerment, LSK remained a voluntary organisation without power to expel or stop a lawyer from practising.[124]

The provisions would be enhanced further in subsequent amendments to the two 1949 Ordinances. The amendments occurred in 1952, 1957, 1961 and 1962. Between 1952 and 1957, the amendments increased the powers of LSK self-regulation. The 1952 amendment increased LSK's disciplinary powers over advocates, while the 1957 amendment, which followed the release of the Report of the Denning Committee on Legal Education for African Students, improved LSK's focus on legal education for indigenous African students. This included setting up an advocates committee which was given disciplinary powers over advocates' clerks and barred advocates from employing clerks without LSK's permission. The 1961 amendment further strengthened professional discipline, remuneration and entry into the profession. Collectively, the amendments elevated LSK's role in Kenya's governance by making it an advisory arm of government in legislative matters. They also enhanced LSK's role in helping the public access legal services.[125] The legal reforms instituted between 1949 and 1962 had the effect of transforming the LSK into one of the most powerful entities in colonial Kenya. It was not only self-governing with little interference from the colonial administration but was also one of the few organisations with the largest concentration of professional members due to a boost in membership which came via the requirement that all lawyers in the country join LSK and have it speak on their behalf.[126]

[124] Ghai and McAuslan, 'Public', 89.
[125] 'Law Society in the Limelight', *The Weekly Review,* 5 December 1986, 3.
[126] Ghai and McAuslan, 'Public', 90–91.

In spite of the powers which the LSK acquired through the legal changes, the organisation exhibited great weaknesses in its core mandate of promoting the rule of law and restraining the colonial state from excesses. This was especially so in not only defending indigenous Africans from the excesses of the colonial government, but also in the promotion of the three cardinal principles of the rule of law. In terms of African rights, the LSK was not only silent with regard to the treatment of the rights by the colonial administration, but also internally within its own ranks. Within the organisation, at least three questions in relation to African rights emerged. These were the question of legal education for indigenous Kenyans, the position of indigenous lawyers within the LSK itself and the provision of legal aid for the majority poor Kenyans.

Even with the passage of the Advocates Act, which was conducive for promotion of African legal education, the LSK remained uninterested in promoting legal education for indigenous Africans. When it eventually showed interest in African legal education towards independence, this was more out of need to survive rather than genuine interest in developing an indigenous component of the legal profession. The LSK was silent during the Emergency, even in the face of the many violations of the law which happened during the period. It was also conspicuously absent in the decolonisation process of the 1950s and failed to identify itself with African causes.[127]

On the question of legal education for indigenous lawyers, the LSK did not challenge the hostile policy which the colonial administration had enacted to discourage legal training for Africans. The administration had deduced that providing Africans with legal awareness may lead them to rise up against colonial rule. It was only towards the end of the colonial era, especially with the formation of the Denning Committee in 1960 that the administration relaxed restrictions on legal training for indigenous Kenyans. Yet even with the relatively friendly recommendations of the Denning Committee report, the LSK did not follow through to encourage increased investment in facilities for training indigenous lawyers. Due to this, Kenyans who sought legal training had to travel outside the country for the training. This put legal training out of reach for majority of Kenyans.[128]

Despite the stringent legal training environment for indigenous Kenyans, by the late 1950s, the country had its first indigenous lawyers. These included C. M. G. Argwings-Kodhek, who

[127] Ibid.
[128] Harvey, *Introduction*, 61–65.

pioneered as Kenya's first indigenous lawyer in private practice, as well as Charles Njonjo and Jean Marie Seroney as government lawyers. However, on returning back to Kenya, these indigenous lawyers found themselves unwelcome into the profession, with the LSK maintaining a hostile attitude towards them.[129]

In terms of legal aid to Africans, perhaps the worst showing by the LSK in the entire period of the colonial era was during the State of the Emergency between 1952 and 1960. Not only did the organisation remain silent in the face of numerous atrocities committed by the colonial government, it also refused to provide legal aid to Mau Mau suspects. Instead, the organisation left the suspects to be represented by either local lawyers in their individual capacity as was the case with lawyers Achiroo Ram Kapila, Argwings-Kodhek and Jaswant Singh or those from outside Kenya as was the case with lawyers Dennis Pritt (UK), Chaman Lall (India), Dudley Thompson (West Indies) and H. O. Davies who were hired by the nationalists such as Pio Gama Pinto and movements like Jaramogi Oginga Odinga's Luo Union to take on legal causes which the LSK had rejected.[130]

There were several reasons why a strengthened LSK remained ineffective in advancing the rule of law. These could be categorised into internal and external reasons. Internally, the racial composition of the LSK made it part of the white settler institutions which had neither representation from Africans nor interest in their plight.[131] Externally, the bifurcation of the legal system into English and customary systems of law through the Native Tribunals Ordinance of 1907 made it hard for LSK members to engage in ways that would have made legal practice useful in curbing colonial government excesses. The bifurcation meant that Africans were subjected to customary law, whereas settlers and non-indigenous foreigners were subjected to English common law. Without accessing the customary legal system, LSK members could justifiably argue that they lacked both the evidence and the platform upon which to question government excesses against African populations.

This is conjecture however, given the fact that there is no record indicating the LSK either raising objection to the establishment of the Native Tribunals, complaining of the Tribunals' interference in the country's adherence to the rule of law or even demanding their abolition

[129] Ghai and McAuslan, 'Public', 95; Harvey, *Introduction,* 63–65; 'Hon. Paul Muite, Senior Counsel', *Mentorship Web Series*, LSK Nairobi Branch, https://www.youtube.com/watch?v=QoJlj6d_gdg (accessed on 16 March 2020).
[130] Cockar, *Doings*, 44-47; Odinga, *Uhuru*, 128; Awori, *Tiger*, 40; Shah, 'Politics of the law'; P. Nowrojee, 'Profession', 36; Ghai and McAuslan, 'Public', 92; Joireman, 'Evolution', 14; Ghai, 'Legal Profession', 10.
[131] George Kegoro, Oral Interview, 3 November 2021; Sihanya, Interview.

towards the end of colonial rule. Instead, the organisation was fully involved in the activities of the colonial administration by providing it with legal counsel and developing the ordinances which the administration used to rule the country. It also supervised the training of the lawyers who eventually served the colonial administration as state counsel.[132]

There were two main consequences for lack of LSK's engagement with the African population. The most outstanding was perhaps the legacy of poor and inadequate legal capacity the country inherited at the dawn of independence in 1963. There were very few African lawyers by the time Kenya got independence. In 1961, for instance, out of over 300 qualified lawyers in Kenya, less than ten were African. As such, the country had no capable legal profession which could stand up to advance the rule of law and restrain the state from excesses.

Secondly, with the LSK totally dominated by non-indigenous interests, even the little legal capacity within the country lacked a platform from which to mount a defence for the rule of law. Due to this, the meagre legal capacity was lost to other pursuits, including careers in politics or the judiciary. It was also distorted by the urban-rural inequalities and lost to indiscipline, a lack of quality standards and the inability to contextualise itself to meet the country's legal needs. As such, the LSK emerged from the colonial era as an institution incapable of promoting the rule of law in Kenya.[133]

2.6 Summary

This chapter has dealt with the question of whether the LSK promoted the rule of law in colonial Kenya, as a way of restraining the colonial administration from excesses. It has argued that the colonial administration violated the rule of law. This was manifested in the administration's refusal to adhere to any of the three rule of law principles consisting of presence of rules to which everyone is subject, existence of checks and balances with separate but equal roles and respect for due process.

During the colonial period, the administration based its authority not on any universally agreed laws but rather on draconian ordinances directed especially at African populations. Although the LegCo and the judiciary emerged during the era, the two institutions did not provide checks and balances under the colonial state. They were not only part of the colonial

[132] Ghai and McAuslan, 'Public', 97–98; Kegoro, Interview.
[133] Harvey, *Introduction*, 63–65; Shah, 'Politics of the law'.

executive but were also heavily dependent on the executive in performing their core functions. Furthermore, the two institutions were structured to serve partisan non-indigenous interests and therefore disregarded African rights.

Towards the end of the colonial period, there were belated attempts to establish a strong rule of law culture in which the three principles would be promoted. The colonial administration spearheaded this effort by developing the country's first five constitutions. The constitutions were not only meant to replace the ordinances-based system which had prevailed during much of the colonial era, but also to involve Africans in regulating the governance of the country. An important aspect of this development was the introduction of a Bill of Rights as the basis for protecting people's rights against government excesses for the first time in Kenya's evolution as a modern state. However, due to the rushed nature of constitutional development and pressures from political movements agitating for decolonisation, the experiment at using the constitution to entrench the rule of law was not successful. As such, the colonial administration was unable to leave behind a legacy of respect for the rule of law through constitutionalism.

The LSK, on the other hand, was an institution set up to support the colonisation of Kenya. Much like most institutions which were transplanted into the country from imperial Britain, it became a white settlers' instrument for restraining the colonial administration and paid scant attention to questions of the rule of law and state restraint in relation to African rights. Although there were instances of minor differences between the organisation and the colonial government, such as when the government opted to hire legal practitioners from the UK at the expense of local European lawyers, there were no major points of disagreement between the two entities.[134]

The relationship between government and the LSK was further made cordial by the fact that lawyers who served in the LSK as senior officials were the same ones who served in other arms of government such as the LegCo. This was the case with Chunilal Madan who served as both the LSK president and assistant minister in the colonial ExCo. As such, these lawyers were able to influence a friendlier government policy towards the LSK. The organisation was thus part of institutions under the control of the same colonial elite. The end result of this was that the colonial-era LSK left behind a legacy of scant restraint of government.

[134] Ghai, 'The Attorneys-General', 144; Shah, 'Politics of the law'.

CHAPTER THREE

LSK IN THE JOMO KENYATTA ERA, 1963–1978

3.1 Overview

The objective of this chapter is to examine the relationship between the LSK and the Jomo Kenyatta administration. The chapter specifically responds to two research issues: the measures the LSK took to restrain the Kenyan state from excesses under the Jomo Kenyatta administration between 1963 and 1978, and the reaction of the Jomo Kenyatta administration to LSK's attempts to stem its excesses.

The chapter commences with the interrogation of the rule of law under the Jomo Kenyatta administration. It establishes how the administration related with the three cardinal principles of the rule of law, namely existence of rules to which everyone is bound, existence of a system of checks and balances with separate but equal roles and responsibilities, and respect for due process. This provides the general rule of law background in which the LSK operated. With the background thus laid out, the chapter then ventures into exploring how the LSK attempted to restrain the Jomo Kenyatta administration from excesses which violated the rule of law, establishing how the organisation was able to manoeuvre around the setup for rule of law in the country. It concludes by indicating the reaction of the administration towards LSK's attempts at restraining it.

3.2 Rule of Law under the Jomo Administration

The Jomo Kenyatta administration inherited the colonial state's institutions. As such, there was significant continuity between the new administration and the colonial state in the way the new administration managed the country. In respect to the rule of law, the continuities included a weak separation of powers among the checks and balances institutions and a weak adherence to due process, even after the enactment of a rule-based system encouraged by the new constitutional arrangement which the colonial administration established just prior to handing over to the Jomo Kenyatta administration.

However, there were also significant ways in which the two administrations differed, signifying a break between the colonial and the Jomo Kenyatta administrations. In the realm of the rule of law, a significant discontinuity was the fact that unlike in the colonial era when the administration ruled without a constitution for most of its existence, the Jomo Kenyatta

administration had a constitution that required the administration to adhere to the rule of law. As such, unlike the colonial administration which for much of its existence did not have to worry much about violating a constitution, the Jomo Kenyatta administration had to contend with a constitution.[1]

Constitutional Rule under the Jomo Administration

Starting with the principle of existence of widely accepted rules which confine the actions of a government to only those actions mandated by the law, the powers of the Jomo Kenyatta administration were first defined by the Maudling Constitution of 1962, which guided the transition from colonial to independent rule, with Jomo Kenyatta serving in a coalition government alongside Ronald Ngala. The Maudling Constitution was refined further in the final Lancaster House Conference held prior to declaration of Kenya's self-government in June 1963. The main outcome of this final Lancaster Conference was the Independence Constitution. In the final constitutional talks at Lancaster House, at least three contentious issues needed to be resolved. The first issue centred on Maasai representatives' claims over the White Highlands. The second issue revolved around the demands to separate the NFD and the Coastal strip from Kenya and ceding them to the Republic of Somalia and the Sultanate of Zanzibar respectively.[2] Perhaps the most contentious issue was the federal system of governance, which was demanded by Ngala's KADU.[3]

The British government brushed aside the demands from the Maasai representatives for exclusive regional rights. For the NFD and Coastal demands to cede the two regions to the Republic of Somalia and the Sultanate of Zanzibar respectively, the colonial administration under the direction of the metropolitan institutions rejected both demands. For the NFD, it set up a commission between December 1962 and March 1963 to establish public opinion in the NFD. The commission recommended setting up an autonomous administration in the region. The colonial administration rejected the recommendation and insisted on the NFD remaining part of Kenya. This led to riots in the region and a boycott of the 1963 election.[4] Concerning KADU's demand for regional governments, the colonial administration was magnanimous. This was mainly because the position was shared by KADU and the remaining white settler

[1] Oseko, 'Reform', 103–110.
[2] Ndzovu, *Muslims*, 37; 'One on One Interview with Martin Shikuku', *KTN News Kenya,* YouTube, 23 August 2012, video, 15:16, https://www.youtube.com/watch?v=uCyU8mPJ7yA.
[3] Goldsworthy, *Mboya*, 131–138; Odinga, *Uhuru*, 222–231; Morton, *Moi*, 90–107; Kenya Editorial Board, *Lyttleton.*
[4] Ndzovu, *Muslims*, 47–49.

minority in Kenya. Siding with KADU, the administration compelled KANU to accept the federal arrangement, despite the party's preference for a strong, centralised system of government.[5]

Once the three contentious issues had been dealt with, the new Constitution was unveiled, and it guided independent Kenya's first election in May 1963, ushering in Kenya's inaugural post-Independence government. The elections saw KANU emerge victorious and proceed to form government under the leadership of Jomo Kenyatta. Upon assumption of power, the Jomo government quickly revisited the Independence Constitution with the intention of undermining it. Labelling it the *Majimbo* constitution and deriding it as a colonial tool for dividing Africans, the administration either ignored some of its provisions such as the Bill of Rights or subjected it to amendments to remove provisions which KANU had opposed during the final constitutional negotiations.[6]

The first high-profile amendment which the Jomo administration introduced to the Independence Constitution removed all constitutional guarantees for regional governments. This was in spite of the fact that the Constitution itself heavily insulated these guarantees from amendments.[7] The administration replaced them with a highly centralised administrative structure under the presidency. It introduced a Provincial Administration which supplanted the regional development model and assigned responsibility for local development to the President. This enabled the Jomo administration to directly control regional development and have a tight hold on regional affairs. With this amendment, federalism as a means for checking centralised powers was abolished.[8]

Besides abolishing federalism as a check on the powers of the presidency, the Jomo administration made other far-reaching changes to the Independence Constitution. Indeed, between independence in 1963 and 1978 when the Jomo administration ended, it made 24

[5] Ojwang', 'Government', 151–152; Ochieng, 'Independent', 205; O. L. Opiyo, 'Remembering Ronald Ngala, the first opposition leader', *Sunday Nation,* 23 December 2018, 38.
[6] Preston Chitere et al., 'Kenya Constitutional Documents: A Comparative Analysis', *IPAR Working Paper* 7, (2006), 12–13; Morton, *Moi*, 290; Kindiki, 'Constitution-Making', 7; Goldsworthy, *Mboya*, 222; 'Lyttleton', *Kenya Yearbook 2010,* Kenya Editorial Board; 'One on One Interview with Martin Shikuku', *KTN News Kenya.*
[7] C. N. Mpaka, 'The People and their Constitution: Kenya's Constitutional Process and 1990–91 KANU Review Committee', in *Democratization and Law Reform in Kenya,* ed. S. Wanjala and K. Kibwana (Nairobi: Claripress Limited, 1997), 4; O. Nyanjom, 'Devolution in Kenya's New Constitution', *SID Constitution Working Paper* 4, (2011), 7–8.
[8] W. E. Kituku, 2006. 'Doomed to fail: A Legal Postmortem of the Bomas Constitutional Conference', *BA Dissertation,* University of Nairobi, 38–40; Chitere (et al), 'Documents', 2; Goldsworthy, *Mboya*, 224–226; 'Argwings-Kodhek', *Kenya Yearbook 2010,* Kenya Editorial Board.

amendments to the constitution,[9] justifying them with the argument that this would stabilise and unify the country.[10] The numerous amendments to the Independence Constitution made the country's transition from British control to republican status characterised by a disregard for the rule of law. Important events such as the transition from Prime Minister to President never followed the established tenets of the rule of law, with Jomo transforming from Prime Minister to President without popular consent. This set off other violations of the rule of law which characterised most of the Jomo era.[11]

Checks and Balances under the Jomo Administration

In terms of the checks and balances required under the second principle of the rule of law, the Jomo administration inherited an administrative set-up in which the state law office, the Provincial Administration, the civil service and the security agencies were all under the direct control of the Executive. The administration consolidated the control of all these institutions by placing them under the direct command of its Attorney General (AG), Charles Njonjo. It also brought investigative and prosecutorial agencies, as well the judicial governance board and budget, under the control of the AG. This put almost all checks and balances agencies under the AG's direct control. It gave the holder of the office substantial power, making him control almost every aspect of the rule of law in Kenya.[12]

One of the checks and balances institutions which was placed under the AG's control was the judiciary. At the time of ascendancy into power of the Jomo administration, the judiciary was subsidised by the British government both financially and in technical terms through the British Overseas Aid Scheme. The Scheme ensured the continued use of expatriate judges within the institution and was responsible for the extension into the independence era of the

[9] In the history of the administration, there was only one constitutional amendment which did not receive the support of the executive. This was the amendment pushed by the GEMA from 1976 aimed at stopping the Vice President from automatically replacing the President in case of the President's indisposition. The effort was dropped after the administration's AG Charles Njonjo threatened the leaders of the proposed amendment against imagining the President's indisposition.

[10] A. Waris, 'Kenya's Fiscal Accountability Revisited: A Review of the Historical Erosion of the Country's Fiscal Constitution from 1962 to 2010', in *Human Rights and Democratic Governance in Post-2007 Kenya: A Post-2007 Appraisal*, 310; Mpaka, 'People', 4; Owiti and Mbaya, 'Order', 50; 'Martin Shikuku', *Capital Talk*, K24 TV, YouTube, 12 December 2010, 22.31 https://www.youtube.com/watch?v=dPJgTNkw4bk.

[11] Kegoro, Interview; M. Owuor and W. Otieno, 'Presidential and Parliamentary Systems: Kenya's Quest for a System of Government', *Rule of Law report: Kenya's Constitutional Moment, 2009–2010* (2010), 59; K. Ngotho, 'If you thought Moses Kuria is hateful, Kihika dwarfs him', *Sunday Nation*, 24 September 2017, 32; Karume and Gethoi, *Gold*; Mwangi, *Constitution-Making*, 10–17.

[12] Cockar, *Doings*, 67; Chitere (et al), 'Documents', 22; Goldsworthy, *Mboya*, 223; F. D. Souza, 'Mboya, Njonjo and their unbridled ambition to gain political power', *Daily Nation*, 6 July 2019, 29; Hillary Ng'weno, 'Life and Times of Charles Njonjo Part 1', *Makers of a Nation* series, NTV Kenya, YouTube, Makers Of A Nation: Life and times of Charles Njonjo | Part One - YouTube (accessed 2 January 2022).

tenure of Sir John Ainley, the Chief Justice at the time of Independence.[13] The judiciary fell under pressure to Africanise immediately after Independence. Using the control he had over the institution and citing the British Aid Scheme, the AG was able to stem off the pressure and maintain the judiciary largely in the hands of expatriate judges. With expatriates in charge of the judiciary, the Jomo administration was able to limit any challenge from the judiciary over questions of the rule of law.[14]

However, this changed in May 1968 under the leadership of the second post-independence Chief Justice, Arthur Dennis Farrell, who had replaced Ainley. Farrell ignited a furious reaction from the Jomo Kenyatta administration when, sitting as Court of Appeal with Justice Dalton, another expatriate judge, he reduced the one-year prison sentence that had been handed to Bildad Kaggia, the deputy party leader of the opposition Kenya Peoples Union (KPU) party led by former Vice President Jaramogi Oginga Odinga, to six months. The reduction in the sentence displeased the administration. It responded by sacking Farrell on 3 July 1968, replacing him immediately with Kitili Mwendwa, the first indigenous African Chief Justice.[15]

Mwendwa's tenure as Kenya's third post-independence Chief Justice lasted till March 1971. It was reportedly marked by administrative challenges, which his critics attributed to his lack of experience as a practicing lawyer or judge and also to his engagement in private business during official hours. His departure from the Chief Justice post came suddenly when, along with senior army officials, he was implicated in plotting to overthrow the Jomo government. As punishment for his involvement in the plot, Mwendwa was forced to resign from heading the judiciary.[16]

With the resignation, the AG invoked Mwendwa's apparent poor record to discourage the further Africanisation of the judiciary and to ensure the continued stranglehold of the institution by expatriate judges.[17] Mwendwa's immediate replacement was Sir James Wicks, who was to become the longest serving Chief Justice in Kenya's history, serving from July

[13] Cockar, *Doings*, 54.
[14] Cockar, *Doings*, 59–60; 'Mutunga', *The Elephant*.
[15] Cockar, *Doings*, 68; Odera, *Confidant*, 110; S. Owino, 'Njonjo, Kenyatta insider who made and destroyed careers', *Daily Nation*, 9 January 2022, 8; M. Mutua, 'Guilty until proven innocent? Sounds right for all politicians', *Sunday Nation*, 1 December 2019, 31.
[16] Cockar, *Doings*, 69–75; Morton, *Moi*, 143; Odera, *Confidant*, 137; Kegoro, Interview; K. Some and W. Githae, 'Military has maintained a dignified distance from polls', *Sunday Nation*, 30 July 2017, 26; N. Gisesa, 'Captain's hand in Kenya's coup bids', *Daily Nation*, 1 August 2020, 7.
[17] Cockar, *Doings*, 81.

1971 to January 1982 and straddling both the Jomo and Daniel arap Moi administrations. His era was characterised by a significant entry of indigenous Africans into the judiciary as magistrates and judges of the High Court.[18] However, his longevity in the position of Chief Justice was attributed to the subservience he pushed the judiciary into in relation to the executive during both the later Jomo and early Moi eras.[19]

By the end of the Jomo era, the executive had acquired substantive control over the judiciary, with the AG exercising both formal and informal power of the institution. Formally, as the AG, he was the judiciary's representative in both parliament and cabinet and was ranked above the Chief Justice in the pecking order within the state. The AG used this position to determine the direction the judiciary took, including the entry of indigenous Africans into the institution through the Africanisation policy, which he significantly slowed down. Informally, the AG is said to have not only directed Chief Justices such as Sir James Wicks on how the judiciary ought to rule on certain cases, but also planted a compromised judge who carried out his wishes, especially in cases involving persons the administration considered dissidents.[20] The overall effect of the AG's influence on the judiciary was to leave it in the hands of expatriate Chief Justices who were removed from local political, socio-cultural and economic realities, and who were easy to influence towards the wishes of the administration. As such, the Jomo-era judiciary had no capability of providing adequate checks on the administration.[21]

The relationship the administration cultivated with parliament, another important player within the framework of separation of powers, was equally one of subservience to the executive. The administration came into power under a bicameral parliamentary arrangement with both a national assembly and senate. The senate was the superior house, representing and protecting regional governments, while the national assembly represented constituencies across the country. Initially, parliament exhibited independence, largely because of the presence of both KANU and KADU within it. It also set up committees such as the anti-corruption and the anti-tribalism committee chaired by Butere MP Martin Shikuku as oversight mechanisms over the administration.[22]

[18] Ibid, 105.
[19] Cockar, *Doings*, 77–86; Shah 'Politics of the law',
[20] Cockar, *Doings*, 67–95.
[21] Oseko, 'Reform,' 110–113.
[22] Ojwang', 'Government', 156; 'One on One Interview with Martin Shikuku', *KTN News Kenya*.

The administration nonetheless embarked on a quick process of dismantling parliamentary independence. It did this in four main ways. First, it co-opted KADU into KANU, thus turning the country's political governance from a multiparty to a single party system. Secondly, it amended the Independence Constitution to expunge the bicameral parliamentary system on which it was based. It replaced the bicameral system with the unicameral single party parliamentary system which not only concentrated power in the executive but was also easy to control.[23]

Perhaps the most effective approach in dismantling parliamentary independence was through planting the administration's AG as government's legal representative in parliament. The AG used this opportunity to check on parliamentary business, clashing with MPs who were most active in providing oversight on the administration. Among these MPs were Koigi Wamwere, James Orengo, Abuya Abuya, Chelagat Mutai, Chibule wa Tsuma, Mwashengu wa Mwachofi and Lawrence Sifuna. The AG branded the MPs the 'Seven Bearded Sisters' and used a combination of intimidation, surveillance, harassment and detention to frustrate their efforts at checking government excesses.[24] Using the powers he wielded over security agencies, the AG gathered intelligence on MPs and cabinet ministers and used it to force them do his bidding.[25] The AG also directed how parliament was to conduct itself, for instance asking it not to elect Jean Marie Seroney as Deputy Speaker. In this instance, parliament defied him and elected Seroney. Eventually, however, the AG had the Deputy Speaker and Butere MP Martin Shikuku arrested within parliamentary precincts and placed in detention for anti-KANU remarks the two had made on the floor of the House.[26] To further curtail parliamentary independence, the administration extended the detention of MPs beyond the so-called 'Seven Bearded Sisters' to include others such as Mark Mwithaga, Muhuri Muchiri, Jesse Gachago and George Anyona. Anyona was detained in May 1974 for voicing out concerns over corruption among senior government officials, including the AG himself.[27]

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[23] Kibwana, Wanjala and Owiti, *Corruption*, 75–76.
[24] Owiti and Mbaya, 'Order', 55.
[25] K. Ngotho, 'Secret tactics Njonjo used to intimidate his colleagues', *Sunday Nation,* 3 June 2018, 9.
[26] Lynch, 'Moi', *Journal of Eastern African Studies,* 33; Owiti and Mbaya, 'Order', 55; B. Muluka, 'Njonjo did great things and made big mistakes', *The Standard,* 3 January 2022, 17; 'Martin Shikuku', *Capital Talk,* K24 TV, YouTube, 12 December 2010, video, 22.31, https://www.youtube.com/watch?v=dPJgTNkw4bk.
[27] Owiti and Mbaya, 'Order', 56; Karume and Gethoi, *Gold*, 212; C. Njonjo, 'It was a huge mistake to abandon the Westminster model for our Parliament', *The Star,* 26 September 2015, 4; K. Ngotho, 'Remembering gallant Young Turks who shaped Kenya, *Sunday Nation,* 6 October 2019, 29; Ng'weno, 'Njonjo,' *Makers of a Nation* series.

The fourth way in which the Jomo Kenyatta administration forced parliament into subservience was through ignoring critical parliamentary processes and committees which called it to account. This was witnessed in at least one inquest led by a special parliamentary committee, the Elijah Mwangale-led special parliamentary committee set up to investigate the May 1975 assassination of Nyandarua North MP, J. M. Kariuki. In its findings, the committee concluded that the assassination had been ordered by senior government officials. Apart from some of those adversely mentioned disregarding summonses to appear before the committee, President Jomo himself compelled the committee to expunge from the final report names of his close associates who the report had mentioned.[28]

When the report was brought to parliament for debate and adoption, AG Njonjo directed against its adoption and had Speaker Fred Mate refuse to have it tabled. However, Deputy Speaker Seroney had the report tabled in the absence of Speaker Mate, and parliament, with the support of at least three government ministers, namely Masinde Muliro, and assistant ministers Peter Kibisu and Mark Mwithaga, eventually adopted it. However, the adoption did not amount to much, given that the administration sacked Masinde for ostensibly going against the tenets of collective responsibility and later jailed Mwithaga and Kibisu on trumped up charges. It also ignored the report's recommendations to prosecute those adversely mentioned.[29] Besides the Elijah Mwangale-led committee, the other parliamentary oversight committee whose work amounted to little was the Martin Shikuku-led anti-corruption and anti-tribalism parliamentary committee. The committee was disbanded unprocedurally in 1975 through a standing order instigated by the AG after it demanded for lifestyle audits of senior government officials.[30]

The overall effect of the Jomo administration's actions against parliament was to weaken the institution's checks and balances capacity. Once it lost this capacity, parliament became an important instrument for the administration to consolidate its power over the rest of society. An example of how the administration reduced parliament into an instrument for consolidating its power was witnessed when the AG compelled parliament to pass

[28] 'Martin Shikuku', *Capital Talk,* K24 TV.
[29] A. Kareithi, 'When a special branch spy hid at City Mortuary to steal JM Kariuki's body', *The Standard,* 10 May 2019, 17; 'Rebel with a cause and the voice of reason, Henry Pius Masinde Muliro', *Kenya Yearbook 2010,* Kenya Editorial Board, Government of Kenya, http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 6 July 2020); J. Osogo, 'Era of political assassinations and horrible regional mistrust in Kenya', *Sunday Nation,* 2 August 2020, 6; Muluka, 'Njonjo'; 'Martin Shikuku', *Capital Talk,* K24 TV; Ng'weno, 'Njonjo', *Makers of a Nation* series.
[30] 'Martin Shikuku', *Capital Talk,* K24 TV.

Constitutional Amendment No. 1 of 1975 which enhanced the President's powers of pardon. The amendment was made solely to benefit Minister Paul Ngei, who the President subsequently pardoned after the High Court had convicted him for electoral malpractices involving intimidation of an opponent, oathing and bribing voters.[31]

Besides the constitution, the judiciary and parliament, the Jomo administration also inherited a political opposition and elections as other mechanisms for checking state excesses. However, just as it had done with the constitution, the judiciary and parliament, the administration reduced the effectiveness of elections and the political opposition to provide checks on its powers. The electoral process that the administration inherited from the colonial administration came with significant flaws, which reduced its ability to check government excesses. The first main flaw was that the electoral management process was under the direct control of the executive. For most of the colonial period, election returning officers had been drawn from the Provincial Administration. Nonetheless, constitutional changes under the Maudling and Independence constitutions introduced an independent Electoral Commission of Kenya (ECK) as the body to manage the country's elections. However, the Jomo administration dismantled this institution shortly after attaining power. By 1969, the administration had reverted the appointment of ECK commissioners to the President, thus reverting the country's electoral management system to the colonial-era system controlled by the executive.[32] Under the executive-controlled system, the election returning officers were appointed from amongst district commissioners and were made to answer to the AG. Being under the direct control of the executive, the electoral management structure was easily calibrated to favour the incumbent and to force electoral outcomes which were in the administration's favour.[33]

The second flaw in the electoral process was the violence which accompanied elections. Violence had been witnessed during the May 1961 elections which followed in the aftermath of the Macleod Constitution, and pitted KANU against KADU. KADU supporters led by Peter Okondo attacked KANU's Oginga Odinga when he went to campaign in Western

[31] K. Ngotho, 'Paul Ngei, the rogue minister who respected no law', *Sunday Nation*, 17 September 2017, 31; Ngotho, 'Turks'; 'Politician with nine lives, Paul Joseph Ngei', *Kenya Yearbook 2010*, Kenya Editorial Board, Government of Kenya, http://cabinets.kenyayearbook.co.ke/church-influence-before-independence/, (accessed on 6 July 2020).

[32] Mpaka, 'People', 4; Mwangi, *Constitution-Making*, 14; 'Hon. Paul Muite', *Mentorship Web Series*,

[33] Awori, *Tiger*, 129–130; W. Maina, *State Capture: Inside Kenya's Inability to fight Corruption* (Nairobi: Africa Centre for Open Governance, 2019), 7; Kamau, 'Chebukati'; W. Maina, 'Flawed election could turn out to be Uhuru Kenyatta's poisoned chalice', *Sunday Nation*, 29 October 2017, 17.

Kenya. In retaliation, KANU supporters attacked KADU supporters in Kisumu and parts of Nairobi, leading to an escalation of violent incidents. In the subsequent 1962 elections, the violence intensified, with Jomo Kenyatta, who was leading the KANU campaign, requiring armed escort provided by colonial security agencies in order to campaign in Kericho, a predominantly KADU zone.[34] Related to electoral violence, the other feature of elections which the Jomo Kenyatta administration inherited, and which prevented elections from becoming an effective means of popular checks on government was its conversion into a system for ethnic mobilisation. Both KANU and KADU relied on ethnic groups for their support. This made it almost impossible for voters to evaluate the two parties on the basis of the policies they advanced. Rather, they voted for the parties based on the ethnic origins of the top leadership.[35]

Thirdly, the results from the electoral process were not just easily manipulatable by the executive but could also be simply rejected if they did not reflect its wishes. This was the case with the 1962 referendum on the future of the NFD. As part of concessions which informed the Maudling Constitution in 1962, it was agreed that a referendum would be held on the future of the NFD. The referendum was to determine whether the NFD would join the greater Somalia Republic, which then included British Somaliland and Italian Somaliland, or remain part of Kenya. The referendum results indicated overwhelming support for joining the greater Somalia Republic by NFD residents. Both KANU and KADU rejected the results. Agreeing with the two parties' position, the outgoing colonial administration declared the NFD the seventh region of Kenya despite protests and boycott of the May 1963 general election by NFD residents.[36]

The fourth flaw which militated against elections as a means for checking the excesses of the Jomo administration was the use of state machinery for electoral advantage. This mostly manifested itself in at least two instances. First, during the "little general election" of 1966 following the decamping of Jaramogi Oginga Odinga and other left-leaning politicians from KANU and formation of the KPU, when the administration used violence and intimidation to confine the KPU to Luo Nyanza, Oginga's home region.[37] In the second incident,

[34] Odinga, *Uhuru*, 221.
[35] Willis, Lynch and Cheeseman, 'Voting', *The Historical Journal Cambridge*, 20–21.
[36] Goldsworthy, *Mboya*, 181–190; Kamau, 'Chebukati'.
[37] Lynch, 'Moi,' *Journal of Eastern African Studies*, 29–30; Goldsworthy, *Mboya*, 243–246; Odera, *Confidant*, 101–132.

administration functionaries attempted to block J.M. Kariuki from participating in the 1974 elections by barring him from campaigning for the Nyandarua North parliamentary seat.[38]

The Jomo administration thus divested elections of their checks and balances efficacy. The fights between KANU and KADU turned them into a tool for ethnic mobilisation,[39] while the fights between KANU and KPU turned them into a weapon for the executive to fight the political opposition and those it deemed too critical. Furthermore, President Kenyatta diminished the effectiveness of elections as a means of checking government excesses when he had a law passed in 1975 to pardon Minister Paul Ngei and enable him run for an elective position despite having been found guilty of electoral malpractices.[40]

The effectiveness of the political opposition as a check on the Jomo administration was neutralised as it was with the other formal checks and balances institutions. The administration faced three significant sources of political opposition when it ascended into power. First, the multiparty system at the time of independence meant that whereas KANU was the governing party, it faced competition from other political parties represented in parliament, particularly KADU. However, with the merger between KANU and KADU, these parties folded up ostensibly to strengthen KANU as a single governing party.[41]

The second source of political opposition to the administration was armed opposition which came through the secessionist movement in the NFD. Following government's rejection of the 1962 NFD referendum, leaders from the region declared secession from Kenya shortly after the country gained internal self-rule in June 1963. The declaration was followed by acts of war in which at least seven senior government officials stationed in the NFD were killed, prominent among them David Wabera, the Isiolo District Commissioner. In retaliation, the Jomo administration deployed both the military and the paramilitary General Service Unit (GSU) in the region. The ensuing conflict between government troops and the NFD secessionists was to last until October 1967, when President Jomo Kenyatta and Mohamed Egal, the Prime Minister of the Somalia Republic which supported the secessionists, signed a

[38] Kamau, 'Chebukati'.
[39] Lynch, 'Moi,' *Journal of Eastern African Studies,* 25–28.
[40] K. Ngotho, 'Ngei'; Muluka, 'Njonjo'; Kenya Editorial Board, *Paul Joseph Ngei*.
[41] Morton, *Moi*, 117–121; Goldsworthy, *Mboya*, 226.

six-point memorandum in Arusha Tanzania for cessation of hostilities between the two states. This effectively ended the NFD's armed opposition to the Jomo administration.[42]

The third site of political opposition to the Jomo administration came from within KANU itself, where internal divisions within the party yielded several opposition groups. The divisions were centred around a clash of personalities, ethnic identities and the need to control resources, and began way back during the struggle against colonialism. Soon after independence, the divisions spilled out into the open, with two antagonistic camps emerging. One of the camps was led by Minister Tom Mboya, and was seen to be leaning towards Western countries, whereas the second camp was centred around Vice President Odinga and was reportedly leaning towards Eastern countries. The Western-leaning faction emerged victorious in the ensuing battle for supremacy within KANU, forcing Odinga to resign from his position as Vice President of both the republic and the ruling party. He went ahead to form a new political party, the KPU in early 1966, and it immediately attracted 29 MPs who defected from KANU.[43]

Anxious about the momentum which the KPU was building within parliament and across the country, the Jomo administration passed within a single day the fifth Amendment to the Independence Constitution, introducing a new clause which required MPs defecting from KANU to seek a fresh mandate through a by-election. The amendment immediately stemmed defections among the MPs.[44] In the by-elections occasioned by the amendment, the administration deployed the state machinery, including physical violence and electoral malpractices, to confine KPU's electoral victory to Luo Nyanza, Odinga's home region.[45] Later, in October 1969, the administration outlawed the KPU and detained the party's MPs among them Odinga, Wasonga Sijeyo, Okelo Odongo, Luke Obok, Okuto Bala, Odero Sar and Ochieng Chilo following riots in Kisumu in protest against President Kenyatta's visit to the region in the aftermath of Tom Mboya's assassination on 5 July 1969. The ban and

[42] K. Ngotho, 'How Jomo Kenyatta tackled major crises during his days at the helm', *Sunday Nation*, 22 October 2017, 29.
[43] Odera, *Confidant*, 99–100; Goldsworthy, *Mboya*, 227; R. Odinga and S. Elderkin, *Raila Odinga: The Flame of Freedom* (Nairobi: Mountain Top Publishers Ltd, 2015), 40–42; Owiti and Mbaya, 'Order', 55; O. L. Opiyo, 'Huge cracks as leaders headed to Lancaster', *Sunday Nation,* 25 November 2018, 29; J. Kamau, 'Jomo's incidental Kanu membership and how a shaky start set itself up for failure', *Sunday Nation,* 10 June 2018, 29; 'Paul Joseph Ngei', *Kenya Yearbook 2010,* Kenya Editorial Board.
[44] Morton, *Moi,* 125.
[45] Odera, *Confidant,* 2010, 101–132; Odinga and Elderkin, *Raila*, 43–48.

detentions effectively ended formal political opposition to the Jomo Kenyatta administration, making Kenya a de facto one-party political system.[46]

Due Process under the Jomo Administration

As the third cardinal principle of the rule of law, due process suffered a fate similar to constitutional rule and checks and balances under the Jomo administration. The administration violated this principle in two major ways. First, it enacted the practice of detention without trial, thereby bypassing the judiciary as the sole constitutionally mandated institution for trying and sanctioning lawbreakers. The practice of detention without trial commenced in June 1966 with the enactment of the Security and Public Order Act, which gave the Minister for Home Affairs the powers to detain individuals without recourse to the law courts. The Act was initially meant to deal with the political opposition presented by the KPU. But gradually, those detained under the law increased and included non-politicians.[47]

The second way in which the administration disregarded the principle of due process was through political assassinations. Under the administration, a number of prominent and high-profile personalities died under controversial circumstances. Granted, assassinations had been witnessed prior to the Independence era, involving the colonial-era's Senior Chief Waruhiu, and KAU officials Tom Mbotela and Ambrose Ofafa who were all assassinated by suspected Mau Mau followers apparently due to collaborating with the colonial administration.[48]

The first assassination under the Jomo administration was that of Pio Gama Pinto, a politician of Asian extraction associated with Jomo's then estranged Vice President Odinga. The 24 February 1965 assassination was blamed on the government, reportedly due to a personal fallout between the President himself and Pinto.[49] Two of the most high-profile assassinations of the Jomo administration were those of Minister Tom Mboya on 5 July 1969 and Assistant Minister J.M. Kariuki in March 1975. In Mboya's case, the main suspect, Nahashon Njenga,

[46]A. G. R. Oloo, 'The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation', in *Kenya: The Struggle for Democracy*, 96–98; Morton, *Moi*, 141; Odinga and Elderkin, *Raila*, 52–60; Odera, *Confidant*, 110; 'How Kenyatta's inaction paved the way to official corruption and impunity', *Saturday Nation*, 20 March 2010, 9; M. Gaitho, 'Election stand-off smacks of a case of history repeating itself', *Daily Nation*, 23 October 2017, 9.

[47] Odera, *Confidant*, 101–132; Owiti and Mbaya, 'Order', 55.

[48] Karume and Gethoi, *Gold*, 84–85; Opiyo, 'Letters'; J. Kamau, 'How colonial jailers blocked attempts on Kenyatta's life', *Daily Nation*, 20 October 2015, 11.

[49] Morton, *Moi*, 121–123; Odinga, *Uhuru*, 287–288; W. Wambu, 'Pinto: Untold life story of first unsung "martyr"', *Sunday Standard*, 14 October 2018, 5; C. Fernandes, 'How Njonjo, Mboya plotted to block Jomo presidency', *Daily Nation*, 11 May 2019, 17; J. Kamau, 'Emma Gama Pinto, the widow that Kenya betrayed, draws her last breath', *Sunday Nation*, 1 November 2020, 27; Sihanya, Interview.

cited an unnamed 'big man' as the person who sponsored the assassination. In the judicial process which followed the assassination, the administration did not fully adhere to the expected process in the trial, conviction and eventual hanging of Njenga.[50] This led to speculation that the suspect was never hanged for the crime.[51] The administration also turned to ethnic mobilisation to stave off questions with regard to the assassination. It did this through ethnic oathing meant to bind the Gikuyu, Embu and Meru Association (GEMA) communities to the administration as a counterweight to Mboya's Luo ethnic group, and even mobilised sections of the church to be part of the process.[52]

In the subsequent tension following the assassination of Mboya, the administration was involved in the massacre of Kisumu residents in October 1969. The massacre was triggered by a public spat between President Jomo Kenyatta and opposition leader Odinga during a public rally. The administration downplayed the incident by presenting it as having been caused by the crowds that allegedly attacked the presidential bodyguard. It interfered with

[50] Goldsworthy, *Mboya*, 279–283; Morton, *Moi*, 139–140; 'Martin Shikuku', *Capital Talk*, K24 TV; O. Obonyo, '50-year mystery of MP's death', *Sunday Nation*, 13 September 2020, 10.

[51] There are at least two versions to the fate of Nahashon Njenga. The first claims that he was hanged at Kamiti Maximum prison, in accordance with the judgement which had been passed against him. This was the official version, and it received corroboration by parliamentarian Martin Shikuku and a London-based blogger of popular Kenyan history, Levin Opiyo Odhiambo. According to Shikuku, the government hangman confirmed to Shikuku that he had hanged a panicky and tearful Njenga. The hangman related this account to Shikuku when the veteran politician visited the Kamiti Maximum prison on a routine visit as an Assistant Minister for Home Affairs during the era of the Moi administration. For Odhiambo, he claimed, in a Facebook post on 3 November 2017, to have accessed secret documents from the archives of the British Intelligence service, the MI6, which indicated the manner of Njenga's execution. According to the account, Odhiambo claimed that Njenga was executed on the morning of Sunday 8 November 1969. This was on the direct orders of the AG Charles Njonjo, who is reported to have called the government hangman, and instructed him to carry out the execution immediately. This was not procedural, given that it was happening on a weekend and the mandatory medical doctor and priest were not present at the execution. Further, the account claimed that Njenga had not expected to be executed, having received assurances of protection from higher up in government, even after being sentenced to death. He thus burst out crying uncontrollably when he realized he was going to be hanged. A second version of Njenga's fate claims that Njenga was not hanged and was instead spirited out of the country and settled in exile in Zambia. While in Zambia, a visiting Kenyan MP, one Hon George Morara bumped into him in early September 1970, almost a year after it was officially announced that Njenga had been hanged. Upon returning back to the country, Morara opened up debate on the fate of Njenga by summoning the press and making inquiries on the question of Njenga's hanging. Morara died in an accident on the Kisumu-Kakamega highway shortly after addressing the press, leading to speculation that the accident had been arranged to stop further debate on Njenga's fate.

[52] Karume and Gethoi, *Gold*, 204–207; Lynch, 'Moi,' *Journal of Eastern African Studies*, 30–31; H. Makori, 'Kikuyu power the bane of Kenya', *The Star*, 5 February 2018, 6; P. Mathangani 'Secrets of Kenyatta oaths that set Kenya on the path to ruin', *The Standard*, 18 December 2016, 9.

evidence of the massacre by destroying photographic and video evidence and also declared a death toll of 11, against eye-witness claims that 100 people died.[53]

Following the murder of J.M. Kariuki in 1975, the administration embarked on a campaign of disinformation in the aftermath of discovering Kariuki's body.[54] State agents planted bombs in a busy part of the Nairobi central business district to cause pandemonium with a view to diverting attention from the assassination and also supplied misinformation that Kariuki had travelled to Zambia. The President himself forced pledges of loyalty from the Cabinet and inspected a military parade and flypast in the Nairobi central business district in a public demonstration of power, a day after parliament expressed deep regret over the assassination.[55] In both the Mboya and Kariuki assassinations, the AG claimed that government was unable to conclusively investigate the assassinations due to interference from parliament, which he alleged diverted the Criminal Investigations Department (CID) from conducting proper investigations.[56]

Other controversial deaths involving senior public officials during the Jomo era that were not subjected to competent and independent judicial inquiry included that of Agriculture Minister Bruce Mackenzie in a suspected bomb attack, which was blamed on Uganda's dictator Idi Amin; that of Dagoretti MP Johnstone Muthiora, which was blamed on political rivalry with then powerful Cabinet Minister Njoroge Mungai; and that of West Mugirango MP George Morara, reportedly due to inquiries he made regarding the fate of Nahashon Njenga, Mboya's convicted assassin.[57]

Perhaps the only high-profile death under the Jomo Kenyatta administration in which due process was followed was that of Ronald Ngala. The administration set up a public inquest in the aftermath of the death in February 1973. Ngala had died of injuries sustained in a road accident in December 1972. His death, coming only 3 years after the death of Mboya, gave

[53] Odinga and Elderkin, *Raila*, 49–50; K. Ngotho, 'When Kisumu Town went up in flames', *Sunday Nation*, 27 October 2019, 27; A. Aketch, 'Kenyatta regime covered up Kisumu massacre', *Sunday Nation*, 3 November 2019, 26.
[54] L. Gitonga-Wanjohi, *The Fifth Columnist: A Legendary Journalist Philip Ochieng* (Nairobi, Kampala and Dar es Salaam, Longhorn Publishers Limited, 2015), 126; Odinga and Elderkin, *Raila*, 65.
[55] M. Gaitho, 'Election stand-off smacks of a case of history repeating itself', *Daily Nation*, 23 October 2017, 9; Ngotho, 'Crises'.
[56] K. Ngotho, 'The enduring mystery of Tom Mboya killer', *Sunday Nation*, 9 July 2019, 27; O.L. Opiyo, 'How Tom Mboya assassination triggered fears of civil war', *Sunday Nation*, 7 July 2019, 27; 'Njonjo', *Kenya Yearbook 2010*, Kenya Editorial Board.
[57] K. Ngotho, 'MP's strange trip to India, fake doctor's jab and sudden death', *Sunday Nation*, 3 March 2019, 25; Opiyo, 'Ngala'; Obonyo, 'MP's death'.

rise to rumours of an assassination. To dispel the rumours, government ordered for a public inquest, with the Deputy Director of Public Prosecution, James Karugu (who later replaced Njonjo as AG), leading the administration's defence. The inquest reached the conclusion that the death was an accident rather an assassination.[58]

Impunity under the Jomo Administration

Due to absence of the three cardinal principles of the rule of law, that is, constitutionalism, existence of effective checks and balances, and respect for due process, the Jomo administration was characterised by massive impunity. The impunity came in two main categories, namely impunity perpetrated to enrich senior officials within the administration, and impunity perpetrated by state security agencies in the name of promoting the country's security, internal stability and development.

Under the first category, senior public officials in the administration engaged in the corrupt acquisition of wealth and property. Although the administration came to power when there was already a law to prevent corruption, the Prevention of Corruption Act of 1956,[59] it was unable to prevent an explosion in corruption. Corruption was especially witnessed in two main areas. First, this was in the acquisition of land, where public officials used their power to grab both public and private land left by departing settlers.[60] In one such case, a Jomo-era Provincial Commissioner used the Commissioner for Lands to confiscate land belonging to an indebted white settler, without following the due process of acquiring land which required the application of the willing-buyer-willing-seller principle.[61] The second area in which massive corruption was witnessed was in the use of positions in government to swindle government institutions. A case in point here was the theft at the Maize Marketing Board perpetrated by the Minister responsible for the Board. Although the government set up a special agency to investigate the case, it did not enforce the recommendations of the agency.[62]

[58] Opiyo, 'Ngala'; Morton, *Moi*, 146–147.
[59] Kibwana, Wanjala and Owiti, *Corruption*, 30.
[60] Morton, *Moi*, 154; Kibwana, Wanjala and Owiti, *Corruption*, 46.
[61] J. Kamau, 'How court helped Charles Koinange grab land in the 70s', *Sunday Nation*, 17 November 2019, 27.
[62] Kibwana, Wanjala and Owiti, *Corruption*, 46; Maina, *State Capture*, 12; K. Ngotho, 'Paul Ngei, the rogue minister who respected no law', *Sunday Nation*, 17 September 2017, 28; K. Ngotho, 'Turks'; 'Paul Joseph Ngei', *Kenya Yearbook*, Kenya Editorial Board.

The administration attempted to strengthen the anti-corruption legislation, making amendments to the 1956 Prevention of Corruption Act in 1967.[63] However, the amendments were ineffective in stemming the tide of corruption and other acts of impunity which followed. The Act itself was undermined by other subsequent regulations, especially the recommendations from the Ndegwa Commission of 1971. The Commission recommended that public officials engage in private business, ostensibly as a means of attracting members of Jomo's Kikuyu ethnic group into the civil service, which they had shunned in favour of private business.[64] After the adoption of the report's recommendations, public servants began to acquire private property and run private businesses. The government not only failed to take action to stop them from doing so, but also failed to set up accompanying accountability mechanisms which the report had recommended, such as setting up an Ombudsman's office to provide oversight on the public service.[65]

The second source of impunity under the Jomo administration was largely driven by security agencies in the name of securing and stabilising the country. Upon taking power, the administration consolidated its hold on the police and intelligence agencies by abolishing the substantive ministry of internal security and transferring its responsibilities to the Office of the President in December 1965. This gave the President direct control over the police and intelligence agencies.[66] The individuals the President appointed to run the police and the intelligence agencies enjoyed immense powers, which they deployed with little regard for accountability. A case in point was James Mungai, a senior Jomo administration police officer who was in charge of the Anti-Stock Theft Police Unit. The unit became heavily politicised and even harassed Vice President Daniel arap Moi. Another senior police officer under the administration was Joginder Singh Sokhi, who was indicted in the assassination of J. M. Kariuki and the possible cover-up of Tom Mboya's assassination. The two police officers were apparently so powerful that no checks and balances institution could call them to account.[67]

[63] Gathii, 'Anti-Corruption Agenda', *Development Review*, 7–11.
[64] Cockar, *Doings*, 73–74.
[65] C. Odhiambo Mbai, *Public Service Accountability and Governance in Kenya since Independence* (Nairobi: African Association of Political Science, 2003), 131.
[66] Gimode, 'Police', 233–239.
[67] N. Gisesa, 'For most security honchos, power is their second nature', *Sunday Nation*, 5 May 2019, 26; J. Kamau, 'Dreaded officer in Jomo, Moi era dies at 82', *Daily Nation*, 2 August 2018, 5; K. Ngotho, 'James Mungai, the rough cop who feared not man or God', *Sunday Nation*, 8 October 2017, 27.

3.3 Jomo Administration and Vertical Accountability

At Independence, Kenya had a well-developed terrain of vertical accountability actors. Three of the most significant actors in this terrain during this time consisted of the faith-based groups (particularly the church), the media and the labour movement. These actors had played a significant role in putting notable restraints on the colonial administration. In addition, they had provided a platform through which anti-colonial nationalists including Jomo Kenyatta operated and established their anti-colonial credentials. It should be noted, however, that it was sections within these vertical accountability institutions which were active in the anti-colonial struggle, rather than the entire entity. For instance, within the faith-based groups, it was the church that was mostly active in the anti-colonial struggle, while other groups such as Muslims were largely invisible, with their activities confined to the NFD and coastal regions.[68] Within the church itself, it was mostly the independent, indigenous churches that were active in the struggle, rather than the mainstream churches. Mainstream churches only became involved in the anti-colonial struggle towards end of the colonial era with changes which elevated indigenous Africans into the leadership of the churches.[69]

Faith-based entities under the Jomo Administration

In the immediate aftermath of Independence, the churches, both mainstream and independent, largely supported the Jomo administration. Among the independent churches, the AIPCA sent a delegation to President Kenyatta not only to pledge support for his administration, but to also ask it to reinstate the schools, churches and legal status, which the church had lost during the colonial-era state of emergency. President Kenyatta obliged, lifting the proscription which had been imposed on the church by the colonial administration. The mainstream churches largely heeded the new President's call to compliment state efforts in the social and economic realms and initiated numerous projects across the country.[70]

Gradually however, a more critical element emerged within both mainstream and indigenous churches. The emergence of the critical element could be attributed to increasing disillusionment with the administration over ethnic favouritism and a poor record in upholding the rule of law, especially in light of increased corruption and assassination of prominent politicians. Within mainstream churches, the critical element centred around the

[68] Ndzovu, *Muslims*, 71.
[69] Nasong'o, 'Rules', 27; Gecaga, 'Profane', 63–68.
[70] D. Gitari, *Troubled but not Destroyed* (Nairobi, Virginia: Isaac Publishing, 2014), 66; J. Kamau, 'Schools?'

National Council of Churches of Kenya (NCCK). It communicated through topical reports addressed to the President as well as through regular magazines. Among topical reports, two of the most notable were *Complaints of the Wananchi: a Confidential Report to the President* and *Who Controls Industry*, both of which addressed ills of the Jomo administration, particularly corruption, inequality, land grabbing, tribalism and nepotism.[71] Among the magazines, the three most prominent were *Target* (which came with a Kiswahili version called *Lengo*), *Beyond* and *Rock*. Of the three, *Target* was the most outspoken. Introduced in 1957 in the aftermath of the Mau Mau uprising, the magazine was edited by John Schofield and focussed on social ills, attacking both the administration and the church for the creeping socio-economic inequality in the country.

Following the breakup between Jomo and Oginga and subsequent proscription of the KPU in 1966, *Target* condemned the treatment which the Jomo government meted out to the political opposition. In 1968, it wrote an editorial condemning government for using public resources to construct the Kenyatta International Conference Centre (KICC) with the aim of converting it into a party headquarters for the ruling party KANU. In response, the administration had Schofield dismissed as editor of the publication.

Schofield was replaced by Henry Okullu, an indigenous clergyman who was rising as a leader within the Church of the Province of Kenya (CPK, later the Anglican Church of Kenya, ACK). Okullu continued Schofield's editorial policy of condemning government excesses using *Target*. The most scathing attack on the Jomo administration by *Target* under Okullu came in the aftermath of the Mboya assassination in 1969, condemning both the assassination and the ethnic mobilisation and oathing which followed it.[72] In attacking the oathing ceremonies, Okullu received support from a much wider section of the church than was usually the norm. This led to an open confrontation between the administration and a majority of mainstream churches. The President himself attempted to reach out to sections of the church, to have them support the oath-taking. However, the church rejected the President's overtures. Instead, it wrote to him at least three letters detailing reasons for its rejection of the oath. In the first letter, the church denounced oath-taking as anti-Christian. In the second one, it warned that oathing was likely to lead to a serious backlash against the Kikuyu people. In the third letter, written on 15 September 1969, the church protested at the

[71] Gitari, *Troubled*, 33–35; Ndzovu, *Muslims*, 55.
[72] Gitari, *Troubled*, 185–186.

conditions under which the oath was administered, especially its forceful, indiscriminate and involuntary application.

The administration not only ignored the pleas from the church against the oathing ceremonies, but also intensified the ceremonies using at least three methods. First, it kidnapped those opposed to the oath and forcibly administered it to them. Secondly, it set up detention centres for holding those who were earmarked for oath-taking. Many of those held were Christians, who had openly opposed the process. Thirdly, it misled the rest of the country on what was happening, with the Minister of State Mbiyu Koinange misinforming an inquisitive parliament that reports of oathing ceremonies were false.[73] Eventually, the administration caved to pressure when the church announced plans for nationwide prayer rallies and demonstrations to condemn the oathing ceremonies. Anxious about the impact the rallies would have across the country, the administration once again summoned the church leadership and agreed to halt the ceremonies.[74]

In general, however, the relationship between the Jomo administration and most of the mainstream churches was cordial, except for the open confrontation over the oathing ceremonies in 1969. There were several reasons for mainstream churches' soft stance towards the administration. First, the churches were divided along denominational lines, and could not speak with one voice over the ills of the administration. Secondly, a section of the churches was complicit in the land grabbing and acquisition of property left by white settlers which was prevalent during the Jomo era. They therefore did not have the moral authority to condemn the ills they were equally involved in.[75] Thirdly, the Jomo administration found an effective way of silencing the mainstream churches. It did this by building and deploying ethnic associations such as the GEMA to tackle the churches' criticism. As a result, the administration received mild condemnation from the mainstream churches, with the only critical voices coming from maverick clerics such as Henry Okullu and David Gitari, who gave radical sermons and edited publications critical of the administration.[76]

For indigenous churches, many were co-opted by the Jomo administration. Having largely supported the anti-colonial struggle, the indigenous churches lent support to the new

[73] P. Mathangani 'Secrets of Kenyatta oaths that set Kenya on the path to ruin', *The Standard*, 18 December 2016, 29.
[74] Nyachae, *Corridors*, 79–80; Mathangani 'Oaths'.
[75] 'Church', *Kenya Yearbook 2010*, Kenya Editorial Board.
[76] Ibid.

Independence government, seeing it as legitimate in representing the aspirations of Kenya's indigenous populations. Nonetheless, there remained radical sects within these indigenous churches, which extended their rejection of government beyond the colonial era. One of the most notable of these sects was *Dini Ya Musambwa* (DYM) in Western Kenya. Having emerged in the early 1940s during the colonial era to oppose both Christianity and modernity brought about by colonisation, DYM resumed its anti-government stance in the early independence era.[77] DYM's rejection of the Jomo Kenyatta administration was based on three grounds. These consisted of first, reluctance of the independence government to return land belonging to indigenous populations which had been seized by white settlers and the colonial government; secondly, continued presence of Europeans in Kenya even after independence; and, thirdly, continued perpetuation of Western ideologies through the modern schooling system. In quelling the demands of the sect, the administration sent Elijah Masinde, the sect's leader, back to jail in 1972, where he served a second stint, having been imprisoned first by the colonial government in 1962.[78]

Muslim influence over the Jomo administration remained minimal. In the early days of the administration, most of the demands Muslim clergy placed on the administration were conflated with the NFD demands for cessation. This raised the question of Muslim loyalty to the country. The question was further exacerbated when the Jomo administration angered the country's Muslim minority by arresting and handing three Palestinians over to the Israeli government on suspicion of plotting to shoot down an Israeli jet. The administration had to deal with both the Muslim anger and external ramifications of the decision, especially when Ugandan President Idi Amin called on Kenyan Muslims to wage a jihad against the Jomo administration. Nevertheless, the administration diffused the emerging tension by having the SUPKEM publicly support its decision.

SUPKEM itself became an important organ through which the Jomo administration related with the country's Muslim community. The body was formed in 1973 under the encouragement of the Jomo administration, which wanted one central body representing Muslims through which it could control the community. The administration had employed the same strategy in creating one giant labour union, COTU and one giant alliance of churches, the NCCK, as a way of controlling the significant constituencies these bodies

[77] Gecaga, 'Profane', 64–65.
[78] Ibid, 64–65.

represented. As the officially recognised organ for representing Muslims, the SUPKEM was highly dominated by politicians active in the Jomo government, among them assistant ministers Kassim Mwamzandi (who was the organisation's founding chair) and Mohamed Sheikh Balala (the founding Secretary General).

Being closely affiliated to the Jomo Kenyatta administration, the SUPKEM was perceived as the administration's conscious effort to prevent emergence of more radical Islamist groupings in the country. The SUPKEM itself faced a number of challenges, chief among them being the political and ethnic differences between the two Muslim-majority regions of North-Eastern and Coastal Kenya. These differences weakened SUPKEM's claim as the legitimate representative of all Muslims. For these reasons, the SUPKEM could not effectively restrain the Jomo administration from excesses.

Indeed, the SUPKEM's weaknesses both as a restraint on the Jomo administration and as an organisation representing Muslims later on led to emergence of other groupings which rose to challenge its dominance of Muslim political and social life. Two of the most important of these later entities were the National Muslim Leaders Forum (NAMLEF) and the Council of Imams and Preachers of Kenya (CIPK).[79] Nonetheless, the SUPKEM had at least one notable success in restraining the Jomo administration. This was with regard to the law of succession. The Jomo administration sought to harmonise all the existing laws and norms in matters of succession, including equalising men and women as well as reforming the Kadhi courts through the 1972 Succession Bill. The SUPKEM teamed up with other entities and rejected the proposed law. So effective was this opposition that the Bill was indefinitely suspended and only gained acceptance in the post-Jomo era.[80]

Media under the Jomo Administration

The Jomo administration's relationship with the media, the second significant actor in the vertical accountability terrain during the early independence era, was equally fraught with compromises and tensions. As had been the case with formal checks and balances institutions, the administration's AG retained a significant influence over the media and other vertical accountability institutions. He used this influence to determine the administration's policy towards these institutions. By the time of independence, Kenya had at least 2 major mainstream newspapers, namely *The East African Standard*, which started in 1902, and was,

[79] Ndzovu, *Muslims*, 72–83.
[80] Ibid, 71.

until independence in 1963, regarded as a mouthpiece for the white settler community, and the *Daily Nation*, which emerged in 1959, at the height of the anti-colonial campaign.[81] In addition, a number of indigenous-controlled news outlets had sprang up during the anti-colonial struggle. As had been the case within the church during the colonial era, it had been mostly the indigenous rather than mainstream media which had been active in decolonisation.[82] After independence, this media fizzled out, and was replaced by other outlets.

The relationship between the Jomo administration and the media swung from grudgingly tolerating the growth of the media, to suppression of emerging editorial content, to co-optation of sections of the media as need arose. The administration came to power at a time when the media in Kenya was just emerging and had as yet to develop some of its most forceful aspects, such as a critical editorial content. Although the administration may not have banned any mainstream newspaper, it nevertheless was keen to control media content, and warned media publications against crossing a certain editorial line. It also co-opted sections of the media whenever this was necessary to pursue certain goals such as suppression of the political opposition.

In terms of grudgingly tolerating the growth of the media, this was witnessed in the rise of such popular publications as *Viva* magazine edited by Salim Lone and *The Weekly Review* founded in 1975 by Hillary Ng'weno, a former Editor-in-Chief at the *Daily Nation*.[83] In addition to the popular publications, there were several church-affiliated publications as well, the most active ones being those from Uzima Press, which published NCCK-affiliated magazines such as *Target*. Politician Koigi wa Wamwere also started a publication called *The Sunday Post* during the era. However, the publication ceased to exist after Koigi was detained. On broadcasting media, Kenya had the Voice of Kenya (VoK) radio and television, which the Jomo government nationalised in 1967 through the Kenya Broadcasting Corporation (Nationalisation) Act, thus making it a government broadcaster.[84]

[81] Mboya, *Freedom*, 100.
[82] Odinga, *Uhuru*, 35; Durrani, *Silent*, 37–38.
[83] J. Kamau, 'Mathai vs Maathai: politics, business and eventful divorce', *Sunday Nation*, 22 September 2019, 32; K. Kabatesi, 'Mass Media Sectors: Assessing the Current Situation,' in *Democratization and Law Reform in Kenya*, ed. Smokin Wanjala and Kivutha Kibwana (Nairobi: Claripress Limited, 1997), 213-220.
[84] Kadhi and Rutten, 'Watchdogs', 244–263; K. Wamwere, 'Moi, Nyayoism and spread of dictatorship and corruption', *Daily Nation*, 9 March 2019, 29.

While grudgingly tolerating the gradual growth by the media, the Jomo administration expressed hostility towards any critical editorial content coming out of the emerging media outlets. A manifestation of this hostility was exhibited in the enactment in 1969 of the the Defamation Act, which introduced hefty penalties on media outlets deemed to have defamed public officials.[85] The administration also took hostile actions against individual journalists and media outlets which pursued a critical editorial policy. One example of this involved Lone's *Viva* magazine, which had given academic Wangari Maathai a platform through which she expressed critical opinion on a court ruling involving her divorce case. Unhappy with the critical commentary, the AG had both Maathai and Lone jailed, citing contempt of court.[86]

Influential media outlets such as the *Daily Nation* carefully navigated the thin line between the administration's hostile attitude towards critical editorial content and exposing the excesses of the administration. Under the editorial leadership of George Githii, a former personal press secretary for Jomo Kenyatta, the *Daily Nation* had success in exposing some corruption cases while in other cases, this only brought it a hostile backlash from the administration. Among the successful cases which the *Daily Nation* exposed was wastage of public funds in the Nairobi City Council. In this case, Alderman Charles Rubia had set aside funds to purchase a Rolls Royce. The newspaper's condemnation of the plan led the Jomo administration to prohibit the purchase of the vehicle. The second corruption case the *Daily Nation* successfully exposed was the maize scandal perpetrated by a Cabinet Minister.[87]

In other cases, however, the *Daily Nation* was not as successful, and its critical content only exposed it to hostile attention from the administration. There were at least three major incidences whose reporting by the newspaper led to a direct confrontation with the administration. The first incidence involved the newspaper's opposition to the 1966 Preservation of Public Security Act, which the administration enacted to deal with politicians affiliated to the KPU. Immediately after the law was enacted, Githii launched an editorial attack against it, prompting both the AG and the Minister for Constitutional Affairs (Tom Mboya) to respond. They not only admonished Githii for his opposition to the new law, but also deported his deputy, one John Dumoga, to his native Ghana. President Kenyatta himself

[85] J. J. Forole. 'The Media and the Anti-corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects', *American University International Law Review* 26, no. 1 (2010): 77.
[86] G. Muigai and O. Z. Elisha, 'The Law of Contempt of Court in Kenya', *The Law Society of Kenya Journal,* 1, No. 2 (2005): 68; Kamau, 'Mathai'.
[87] Gitonga-Wanjohi, *Ochieng*, 61; K. Ngotho, '"enmity"'.

summoned Githii and warned him 'not go too far', claiming that a hostile editorial policy by the media was likely to plunge the country into chaos, to which journalists would not be immune.[88]

The second case involved the reportage of the anticipated death of President Kenyatta after he suffered a heart attack in 1968. The *Daily Nation* had reportedly written an obituary in anticipation of the President's death. Unhappy with the obituary, the government successfully compelled Aga Khan, the media outlet's owner, to sack Githii over the obituary debacle. The third incidence involved coverage of Tom Mboya's assassination in July 1969. In this incidence, the government deported another *Daily Nation* employee, news editor Michael Chester, for reports of the assassination which government found unacceptable.[89]

Conversely, the Jomo administration often co-opted the media on certain aspects even as it expressed hostility on others. For instance, in suppressing government opponents, the administration managed to co-opt the *Daily Nation*. This was the case in at least two instances. The first instance involved the administration's suppression of the KPU. In this instance, Githii was compromised to instruct his staff to give the opposition party a media blackout. This was similar to a policy the government had forced on the public broadcaster, the VOK radio and TV, both of which gave the KPU a blackout.[90] A second instance of media-government collusion involved the May 1975 assassination of politician J. M. Kariuki. In this instance, the *Daily Nation* was accused of having deliberately misled the country on the whereabouts of the politician. It had reported that Kariuki had travelled to Zambia, whereas the truth was that he had been murdered and his body dumped on the outskirts of Nairobi. For this, the media outlet received a public backlash.[91] It should also be noted that the administration banned other forms of publications and artistic expressions, which it deemed too critical. This was the case not just with the NCCK-affiliated publications such as *Target* and writings of critical academics such as Ngugi wa Thiong'o, but also vernacular musicians who sang condemnatory songs such as *maai ni maruru* (water is bitter) in the wake of J. M. Kariuki's assassination in 1975.[92]

[88] 'Inaction', *Saturday Nation*.
[89] Gitonga-Wanjohi, *Ochieng*, 63–68.
[90] Odera, *Confidant*, 114; K. Kabatesi, 'Press Law: Some Home Truths', in *Democratization and Law Reform in Kenya*, 184.
[91] Gitonga-Wanjohi, *Ochieng*, 126; Odinga and Elderkin, *Raila*, 65.
[92] Owiti and Mbaya, 'Order', 56; Nyachae, *Corridors*, 81; Gitonga-Wanjohi, *Ochieng*, 16–117.

The Labour Movement under the Jomo Administration

Of the three vertical accountability actors active during the early independence era, it was perhaps the labour movement which attracted the Jomo administration's most agile attention. At the dawn of Independence, Kenya had a vibrant labour movement, which had emerged during the colonial era. It had been the foundation from which many of the nationalists who engaged in the anti-colonial struggle had emerged. Among labour movement leaders who went on to play an active role in the country's politics in the independence era included Tom Mboya, Clement Lubembe, Chege Kibachia, Denis Akumu, Arthur Ochwada and Pio Gama Pinto.

The administration inherited two formidable labour organisations: the Kenya Federation of Labour (KFL) led by Tom Mboya and the Kenya African Workers Congress (KAWC) led by Dennis Akumu. Although Mboya quit as the Secretary General of the KFL in 1963 to take up a ministerial appointment in the Jomo administration, he remained influential within the organisation. A few years into independence, the two labour movements were caught up in the political split within the ruling party KANU, which led to the emergence of the pro-Western and pro-Eastern factions within the party soon after independence. Whereas KFL aligned itself to the pro-Western faction, the KAWC aligned itself to the pro-Eastern faction.[93] With the pro-Western faction (to which both President Kenyatta and Mboya were affiliated) emerging victorious in the fight for control of KANU, it sought to destroy the rival pro-Eastern faction and its affiliates. It did this so as to deny the leaders of the pro-Eastern faction (who included Odinga, Gama Pinto and Kaggia) a platform from which they could challenge the pro-Western faction. In 1965, therefore, President Kenyatta set up a nine-member committee with Mboya as a member, to streamline the labour movement across the country. The administration cited the need to manage industrial strikes and labour unrest as justification for setting up the committee. The committee was expected to review the trade union situation and align labour unions to the aspirations of the administration's development blueprint, *Sessional Paper No. 10. on African Socialism and Its Application to Planning in Kenya*.

The committee's report recommended the deregistration of both the FKL and the KAWC, within four weeks of the report's publication. More significantly, it recommended the

[93] Goldsworthy, *Mboya*, 229–231; also 241–242; Akuma and Chacha, *Atwoli*, 32–33.

creation of a new body, the Central Organisation of Trade Unions (COTU), which would become the umbrella body for all labour unions in the country. The Secretary-General of COTU would be appointed by the President and would be both affiliated and answerable to KANU.[94] The government adopted the report and implemented the recommendations, appointing Clement Lubembe as COTU's first Secretary-General in October 1965.

To further weaken the labour movement as an effective vertical accountability actor, in 1969, the Jomo administration disaffiliated the Kenya National Union of Teachers (KNUT) and the Union of Civil Servants of Kenya from COTU. This had the effect of depriving COTU of a huge membership and subscriptions, given that these two unions were the affiliates with the biggest membership. In carrying out the move, the administration claimed that the two unions belonged to public servants and thus could not organise against a government they worked for. With these changes, the labour movement ceased being an effective check on the administration and became an appendage to the country's executive.[95]

It can be concluded that the Jomo administration had a systematic agenda of weakening checks on its excesses. Within the vertical accountability terrain, the administration found at least three active vertical accountability actors. These were the church, the media and the labour movement. Of the three, the media and the labour movement were rendered incapable of restraining the administration from excesses through passage of hostile laws and operating regulations. Only the church retained the capability to hold the administration to account, largely because dealing with it required more than hostile laws and regulations. It was in this context that the LSK was expected to operate. The next section examines how it faired.

3.4 LSK Reactions to the Jomo Administration

At the dawn of independence, the LSK was structurally characterised by several features. First, it was governed and regulated under the LSK Act of 1962. This was an old law, which had initially been enacted in 1949, and had been amended in subsequent years, helping it strengthen the regulatory environment for the LSK. The 1962 Act, made in light of the Macleod Constitution, provided the objectives for the organisation, among which included regulating entry into the legal profession and maintaining professional standards within the sector. More importantly, the 1962 Act elevated LSK's role by making it an advisory arm of

[94] Akuma and Chacha, *Atwoli,* 5–6.
[95] Goldsworthy, *Mboya*, 241–242; Akuma and Chacha, *Atwoli,* 34; G. R. Murunga, 'Governance and the Politics of Structural Adjustment in Kenya', in *Kenya: The Struggle for Democracy*, 268.

government in legislative matters. It also enhanced LSK's role in helping the public access legal services.[96]

Secondly, the organisation's governance was characterised by domination by non-indigenous lawyers. Although the 1962 Act had changed the title of the organisation's leader from president to chairperson, expanded LSK council to nine members and shifted the power to elect the LSK chairperson from the council to the entire LSK membership, it failed to break the hold which non-indigenous lawyers enjoyed over the organisation's leadership. Indeed, this domination was to continue deep into the country's post-independence era. The entire Jomo Kenyatta-era witnessed the non-indigenous domination of the LSK characterised by a recurring pattern in which the LSK leadership alternated between Europeans and Asians. Among LSK's chairpersons during this era were Justice Harris (1963–1964), B. T. Modi (1964–1965), S. M. C. Thomson (1965–1966), G. S. Sandhu (1966–1967), K. B. Keith (1967–1968), E. P. Nowrojee (1968–1969), P. Le Pelley (1969–1970), M. Z. A. Malik (1972–1973), J. A. Couldrey (1973–1974), Ramnik Shah (1974–1975), P. J. Ransley (1976–1977) and K. C. Gautama (1977–1979). There were only two indigenous chairmen during the entire Jomo era, namely S. N. Waruhiu (1970–1972) and S. Sangale (1975–1976).[97] Yet even with the two indigenous lawyers at the helm of the LSK, they served in the shadows of non-indigenous domination of the organisation. The continued domination of the LSK by non-indigenous lawyers became a constant source of friction within the organisation.[98]

The non-indigenous lawyers' dominance of the LSK was facilitated by two factors. First, the lawyers received direct support from the Jomo administration's AG to maintain their dominant position in the organisation. Secondly, the dominance was facilitated by the small number of indigenous lawyers in the immediate aftermath of independence. In 1968, just over four years after independence, of the 292 advocates based in Kenya, only 11 were indigenous Kenyans, with Asians dominating at 224, while Europeans were 57.[99] The main reason for these small numbers of qualified indigenous lawyers had its roots in lack of investment in legal education during the colonial period. Both the colonial administration and the colonial-era LSK had blocked legal education for indigenous populations and only became interested in it during the decolonisation phase, largely because of the need to train indigenous lawyers

[96] 'Law Society in the Limelight', *The Weekly Review*.
[97] Kegoro, Interview; Jackson, 'The Law Society of Kenya', in *An Introduction to the Legal System in East Africa*, 107.
[98] Cockar, *Doings*, 107.
[99] Ghai and McAuslan, 'Public', 99.

who would take up state appointments with the departure of the colonial administration. The change in policy which came with independence did not change the attitude of the non-indigenous dominated LSK towards indigenous lawyers. The organisation did not welcome the first two or three graduating classes of indigenous Kenyans who had sought legal training at the University of Dar es Salaam. This led to hostility between indigenous lawyers and the non-indigenous leadership of the LSK.[100]

The persistent dominance of the non-indigenous groups of the LSK leadership led to three main outcomes. First, the LSK lacked the requisite commitment to address the rule of law violations perpetrated by the Jomo administration. Secondly, it divided the organisation into two factions: indigenous and non-indigenous. The indigenous faction placed pressure on the organisation to Africanise both the leadership and the membership. Thirdly, the domination resulted in a persistent hostile and indifferent policy towards indigenous legal professionals. This in turn denied the organisation support among majority indigenous Kenyans. The lack of popular support also stemmed from the fact that the LSK had not had any outreach programmes which would have made it relevant to the needs of indigenous Kenyans. It failed to develop effective legal aid schemes for supporting access to justice, with a majority of its members remaining out of reach by being concentrated in major urban areas, whereas many indigenous Kenyans lived in rural areas at the time. Collectively, the three outcomes from the continued dominance of the LSK by non-indigenous lawyers made the organisation incapable of emerging as an effective vertical accountability actor against the Jomo administration.[101]

Indeed, the three weaknesses forced the LSK into silence in the face of violations of the rule of law during most of the Jomo Kenyatta era. The silence was from both the non-indigenous and indigenous members of the organisation. Non-indigenous members kept silent in order to continue enjoying their privileges and to survive the hostile environment that had been set up for actors providing both horizontal and vertical restraints on the Jomo administration. The administration had hinted at nationalising the organisation as a way of enhancing access to legal aid. Given this hint, the non-indigenous membership of the organisation avoided confronting the administration for fear of attracting the nationalisation of their organisation.

On the other hand, indigenous lawyers remained silent so as to benefit from the Africanisation policy, which promised to have indigenous Kenyans absorbed into state

[100] Ibid.
[101] Ibid.

employment. Indeed, some indigenous lawyers played important roles in the Jomo administration. This was the case, for instance, with S.N. Waruhiu, the first indigenous LSK chairman in 1970, who served the administration as chairman of a national committee for promoting the Africanisation of retail and wholesale trade.[102] By providing support to the administration and its Africanisation policy, the indigenous LSK members expected that they would be appointed to top positions in the state law office and the judiciary, thus reducing the dominance of non-indigenous lawyers in these two institutions.[103]

The silence translated into tokenism between the LSK and the Jomo administration in the promotion of the rule of law. One such mild engagement involved the principle of checks and balances between the executive and the judiciary. This was in the aftermath of the collapse of the East African Community (EAC) in 1977, which eliminated the East African Court of Appeal. This left Kenya without an appellate court. To rectify the situation, the AG drafted a bill forming a Kenyan national Court of Appeal, which the LSK reviewed and wrote a petition indicating adjustments. These included separating High Court judges from Court of Appeal judges, having the Court of Appeal hear constitutional appeals and appeals from the High Court, confining the President's power to appoint Court of Appeal judges to only one appointment and making the Court of Appeal the supreme court in the country.[104] As for other aspects of the rule of law, including emphasising constitutionalism and respecting due process, the LSK remained silent, even as the state of rule of law deteriorated across the country under the Jomo administration, including the assassinations of Tom Mboya and J. M. Kariuki in 1969 and 1975 respectively.[105]

Nonetheless, there were at least two sources of friction that caused a section of the LSK to become critical of the administration. The first friction was caused by the AG's disdain for indigenous lawyers, continued preference for non-indigenous lawyers and lack of commitment to the Africanisation policy. This forced indigenous lawyers to come out fighting the hostile attitude towards them.[106] The second source of friction between lawyers and the Jomo administration came from individual members of the LSK who, operating

[102] Awori, *Tiger*, 76; Sihanya, Interview.
[103] Joireman, 'Evolution', 16; N. Kihuria, 'How Charles Njonjo barred Africanization of the Judiciary', *Standard Digital*, 8 January 2014, https://www.standardmedia.co.ke/counties/article/2000101813/how-njonjo-barred-africanisation-of-the-judiciary (accessed 16 October 2021).
[104] 'Lawyer's Ire', *The Weekly Review* 1 August 1977, 11.
[105] Sihanya, Interview.
[106] Kihuria, 'Njonjo'; Y. P. Ghai, 'The Attorneys-General', 150; Y. P. Ghai, 'Legal Profession', 12–20; Joireman, 'Evolution', 16.

outside the policy of silence adopted by the organisation, decided to speak in defence of the principles of the rule of law which the administration was violating. The two most vocal lawyers in this mould were A.R. Kapila and Byron Georgiadis. Both lawyers denounced the lack of effective checks and balances as manifested in the administration's domination of the judiciary. Georgiadis wrote three op-ed articles in *The East African Standard* in which he decried the administration's subordination of the judiciary. In reaction, the Jomo administration stripped him of his citizenship, closed down his law firm and exiled him.[107]

Kapila, on the other hand, raised additional questions over the continued disdain which the AG showed towards indigenous lawyers and their aspirations. In response, the AG used a statute barring entry into the country with undeclared foreign currency to have the lawyer jailed for 18 months.[108] Although the statute provided for a fine upon conviction, the AG influenced the court's decision and had the lawyer jailed without being offered the option of the fine.[109]

A slight change in the racial composition of the LSK leadership, particularly the election of S.N. Waruhiu as chairperson of the LSK in 1970, resulted in the organisation showing signs of moving away from silence and becoming a vertical accountability actor by expressing itself on rule of law issues. This was exhibited when Waruhiu organised a meeting of the Commonwealth Legal Bureau (Africa Region) in Nairobi in August 1971. The meeting resulted into formation of the ABA, with Waruhiu being elected its secretary-general, while the general secretary of the Nigerian Bar Association, Benson Babatunde, was elected chairman.

Immediately after elections of its leadership, the new continental bar association pronounced itself on major rule of law issues in the continent at the time. It denounced the contemporary habit of detention without trial, which it stated was contrary to the rule of law as it signified a disdain for due process. It also pledged to support lawyers across the continent who would defend suspects facing political crimes, develop a strong and independent legal aid service, and carry out research into legislation which could help advance individual liberty in the

[107] 'The Law: Kapila Convicted', *The Weekly Review,* 1 August 1978, 21; K. Ngotho, 'Tactics'; Nowrojee, 'Profession,' 33–36; Ghai and McAuslan, 'Public,' 98.

[108] During the early Moi era, Kapila apparently got his revenge on Njonjo. He was offered the opportunity to head the evidence collection team for a secret secretariat that had been set up by Moi to bring down Njonjo as a '*msaliti*' (traitor) in his government who was allegedly being groomed by foreign powers to take over government. Kapila served with relish, indicating that since Njonjo had rubbed many people the wrong way, finding evidence to nail him would not be difficult.

[109] Cockar, *Doings,* 74; K. Ngotho, 'A tale of a 'traitor' and a VP', *Daily Nation,* 3 June 2017, 27.

continent. In engaging this way, Waruhiu sought to transform the LSK into a public protector and platform for opposing state excesses. This set stage for later LSK chairpersons.[110]

However, this display was followed by reversion to a seven-year silence from both the ABA and its founder-member, the LSK. This may have been due to either Waruhiu's affiliation to the administration as chairman of one of its Africanisation committees or his departure from the LSK leadership. It was not until April 1978 that LSK was heard again addressing itself to issues of the rule of law. This was during another major conference in Nairobi, organised under the chairmanship of Krishan C. Gautama, whose rise to the LSK leadership had come as a result of support from indigenous lawyers in the 1977 LSK election. The conference provided opportunity for the LSK to evaluate its role in Kenya's evolution towards respect for the rule of law. There were several features to the conference which indicated LSK's new intentions in promoting the rule of law. First, the conference provided a platform for different practitioners to appraise the country's adherence to the rule of law. This was through presentation of different papers, among them 'the independence of the judiciary and the rule of law in Kenya,' made by Justice H. G. Platt; 'the rule of law and the executive' by MP James Nyamweya; 'law ethics and logic' by Jacob Ombonya; 'the preservation of parliamentary powers and immunities' by Humphrey Slade; 'the rule of law and the press in Kenya' by Hillary Ng'weno; and 'the rule of law in general and Kenyan perspectives' by J. B. Ojwang and Gibson K. Kuria.

Secondly, the conference made recommendations meant to strengthen the rule of law. One of these recommendations was that everyone, particularly government officials, should uphold the rule of law, given that it was the basis for good governance. Respect for the rule of law was to be manifested through government respecting judicial independence and the independence of the legal profession. It was also to be demonstrated by allowing freedom of speech and expression. The conference also recommended that legal aid should be provided to the poor so that they would not be disadvantaged in the judicial system.

Thirdly, the LSK identified a number of critical features of the rule of law on which it was to focus most of its attention, in respect to the conference's recommendations. These were the Bill of Rights, the separation of powers to guarantee judicial independence, and legal aid for poor Kenyans. It also repositioned itself in the formulation of the country's laws, shifting

[110] W. B. Harvey, *An Introduction to the Legal System in East Africa* (Nairobi: Kenya Literature Bureau, 1975), 111–112; Kegoro, Interview.

away from merely commenting on drafts of law released by the AG to directly engaging in the actual drafting of the laws. The organisation justified this new focus by noting that it was in line with the 1962 LSK Act which mandated the organisation to protect Kenyans from the violation of their fundamental rights. It went ahead and formed two organs to spearhead work in the new areas of the rule of law, namely the legislation and law reform committee and the legal aid scheme.

In order to gain public support for its work, the LSK resolved to work on its public image. Critical to this new image was overcoming its internal challenges, topmost of which was the racial divide pitting indigenous against non-indigenous lawyers. The organisation diagnosed that this particular challenge had given it a negative image amongst the general public and prevented it from discharging its mandate. To overcome it, it resolved to engage in public outreach work.[111]

Two months after the conference, the LSK displayed its credentials as a vertical accountability actor for the first time in its history by opposing the Capital Gains Tax. The tax had been introduced by the Jomo Kenyatta administration's Finance Minister, Mwai Kibaki. The Minister justified the tax on the basis that it would promote 'social justice.' The LSK issued a memorandum demanding for the immediate abolition of the tax. It argued that the tax was not only punitive, but that would also harm private businesses and affect Kenya's commitment to private enterprise. Although the Minister dismissed the LSK memorandum, he nonetheless revised a few aspects of the tax, reducing the taxable amount and making it progressive such that those who earned more from capital gains paid more than those who earned less. It was to become the first recorded instance of the LSK restraining the Kenyan state, almost 30 years after the organisation's formal recognition.[112]

The election of Gautama as LSK chairman in 1977 with the support of indigenous lawyers in itself was indicative of the shift which was taking place in the LSK leadership. His campaign had been spearheaded by indigenous lawyers among them Paul Muite, Timan Njugi, J. O. Masime, Amos Wako and Gibson Kamau Kuria. Gautama ran against Richard Kwach, an indigenous lawyer who was viewed as a candidate for non-indigenous interests. With the

[111] 'Kenya Law Society goes for New Image', *The Weekly Review*, 12 May 1978, 9–11.
[112] 'Taxation Still No Gain', *The Weekly Review*, 23 June 1978, 26–27.

election, LSK leadership swung decisively in favour of indigenous domination, which marked an important milestone in the evolution of the organisation.[113]

3.5 Jomo Administration's Responses to the LSK

The LSK was not an active player in the vertical accountability terrain during the bulk of the Jomo era. As such, it received less hostile attention from the administration and instead was facilitated to maintain its status as an ineffective vertical accountability actor. The administration exploited at least two major weaknesses within the organisation to render it unable to emerge as a vertical accountability actor. The first major weakness was the LSK's racial make-up, which divided the organisation along racial lines, with two factions, indigenous and non-indigenous, engaging in internal competition. This prevented the organisation from focussing on the rule of law environment churned out by the Jomo administration. It also denied the organisation the local legitimacy necessary for questioning the excesses of the administration.

The administration exacerbated this division by siding with the non-indigenous faction. Through the AG, the administration helped the non-indigenous faction to maintain its dominance in the LSK by taking at least two measures which minimised the numbers of indigenous lawyers joining the legal profession. The first measure involved ensuring that both the LSK and the Kenya School of Law (KSL) tightly controlled entry into the country's legal profession. Although the KSL had been established in 1964 to train indigenous legal professionals,[114] it remained hostile to the idea of training indigenous Kenyans even after Independence. This was illustrated by the fact that from 1963 to 1969, the number of indigenous Kenyans admitted as advocates of the High Court ranged from three to 14 per year. Due to this hostile attitude towards training indigenous Kenyans in law, many students left the country to go and train at the University of Dar Es Salaam in Tanzania.

Yet even with this alternative, the AG encouraged the non-indigenous-dominated LSK to withhold recognition for the law degree from the University of Dar es Salaam, and to insist that graduates from the university repeat courses they had already done. This prompted Nyandarua North MP J. M. Kariuki to move an amendment bill in parliament in 1974 on the 1962 Advocates Act. The amendment compelled the state to recognise law degrees not just

[113] Kihuria, 'Njonjo'.
[114] 'Hon. Paul Muite', *Mentorship Web Series*.

from Dar es Salaam University but also those from the law faculties of the University of Nairobi and Makerere University. This minimised the power of both the AG and the LSK in controlling the numbers of lawyers entering the profession.[115]

The second measure involved deliberately slowing down the Africanisation of both the Bench and the Bar. The AG justified the slowing down by citing two reasons, namely lack of qualified personnel among the indigenous population and opposition from the British government, which wielded significant influence on the legal profession by funding the country's judiciary. When Kitili Mwendwa, Kenya's first indigenous Chief Justice appointed in August 1969 was forced to resign in March 1971 over allegations of plotting a coup against the Jomo government, the AG and the non-indigenous faction within the LSK cited this as further reason for stopping the Africanisation of the legal profession.[116]

The second major weakness within the LSK which the Jomo administration exploited to keep the organisation away from questioning its excesses involved its past silence in the face of colonial injustices. Having kept silent during much of the colonial era in spite of numerous excesses of the colonial administration, it lacked both the public support and the moral authority to challenge the excesses of the administration.[117] Exploiting this weakness, the Jomo administration threatened to nationalise the organisation in the name of promoting legal aid across the country. It also punished the few individual lawyers who challenged its excesses. This was the case with Yash Pal Ghai, Byron Georgiadis and A. R. Kapila, all of whom paid individual prices for questioning the administration's commitment to the rule of law, with Ghai being refused employment as a lecturer in Kenya, Georgiadis losing his Kenyan citizenship and Kapila becoming the first lawyer to be jailed in independent Kenya.[118]

The relationship between the Jomo administration and the LSK was one of mutual accommodation. The administration did not directly repress the institution and instead helped it maintain the privileges its non-indigenous members enjoyed. In return, the LSK did not raise any serious questions with regard to the administration's conduct towards the rule of

[115] Kihuria, 'Njonjo'.
[116] Cockar, *Doings*, 107; Nowrojee, 'Profession', 35; P. Mwangi, 'Cartels in the Illegal Profession: How Lawyers are Actors and Accessories to Corruption', *Sunday Nation*, 13 January 2019, 29; Souza, 'Mboya.'
[117] Ghai and McAuslan, '*Public*', 98–101.
[118] Cockar, *Doings*, 74; Gachoka, 'Charles Njonjo'; 'Njonjo: Man who Wielded Power in Two Governments', *Daily Nation*, 23 January 2020, 5; Ngotho, 'Tactics'.

law. This was to remain so until only towards the end of the Jomo era, when the organisation's leadership shifted towards domination by indigenous Kenyans.

3.6 Summary

The Jomo administration inherited an institutional and structural legacy in which there existed both horizontal accountability institutions and vertical accountability actors. Within the horizontal accountability terrain, the colonial government had left behind the Independence Constitution, the judiciary, a bi-cameral parliament and intelligence agencies with a capability for gathering information to boost transparency. Within the vertical accountability terrain, there were at least three active players: the church, the labour movement and the media.

However, the administration quickly set out to dismantle this system of checks and balances. Of all the institutions it inherited both within the horizontal and vertical accountability domains, only the church retained the capacity to restrain the administration. This was witnessed during the oathing ceremonies of 1969, when the church forced the government to stop the ceremonies. However, due to its own frailties such as complicity in some of the impunity of the time, the church rarely deployed its full capability in restraining the Jomo Kenyatta administration.

Within this environment, the LSK may have been expected to emerge as an active vertical accountability actor, due to its statutory obligation provided under the LSK Act of 1962, to promote respect for the rule of law across the country. But it did not do so. There were several reasons for LSK's inability to emerge as an active vertical accountability actor in defence of the rule of law. First, its past of silence in the face of colonial atrocities denied it the moral authority and public support necessary to perform as a vertical accountability actor. Secondly, it was dominated by a non-indigenous group whose commitment to rule of law in the newly independent country was minimal. Thirdly, its racial composition made it lack the necessary internal unity of purpose to focus on the wider rule of law context. Perhaps more significantly, it was placed under the direct control of a powerful Jomo administration functionary, the AG Charles Njonjo, who used regulatory processes to control the institution and render it incapable of emerging as an effective vertical accountability actor.

It was only towards the end of the administration with Jomo's demise in August 1978 and particularly after the shift in control of the institution from non-indigenous to indigenous

legal professionals that the institution began to show great promise as a vertical accountability actor. This was demonstrated most significantly under the leadership of the indigenous-backed Krishan C. Gautama, who in April 1978, organised a conference which reset the LSK's role in the country's evolving rule of law sphere. Soon after the conference, the organisation engaged in an action which directly challenged government policy. It was the first instance of the LSK restraining the state since the organisation's formation in the 1920s.

CHAPTER FOUR

LSK AND THE MOI ERA, 1978–2002

4.1 Overview

In this chapter, the specific study objective is to examine the interaction between the LSK and the Moi administration. It commences with the interrogation of the rule of law context under the Moi administration. It establishes how the administration related with the three cardinal principles of the rule of law. These are existence of constitutionalism, checks and balances and, respect for due process. It also explores the administration's relationship with vertical accountability institutions. This provides the general rule of law background in which the LSK operated. The background thus laid out, the chapter then explores how the LSK attempted to restrain the Moi administration from excesses, establishing how the organisation was able to manoeuvre around the terrain laid out for rule of law institutions in the country. The chapter concludes by indicating the reaction of the administration towards LSK's attempts at restraining it.

4.2 Rule of Law under Moi's One-Party Administration

There were two main dimensions to the Moi administration and its relationship with the rule of law institutions. The first dimension consisted of the administration's interaction with, repurposing and continued use of the rule of law institutions directly inherited from the preceding Jomo administration. It commenced from the administration's ascendancy into power in August 1978 and lasted till the adoption of political pluralism in early 1990. The second dimension consisted of the administration's control of the rule of law institutions from the early 1990s following the emergence of the good governance agenda and subsequent demands for political pluralism. Under both dimensions, the Moi administration was active in shaping the rule of law terrain to serve its hold onto power.

Under the first dimension, the Moi administration inherited an administrative set up which the Jomo administration had largely used to centralise power in the Office of the President. The set up consisted of both an administrative structure and a set of institutions with a direct mandate in promoting the rule of law. The administrative structure had a Cabinet of Ministers as the top decision-making body in government. Below the Cabinet, other important structures of government included the State Law Office headed by the AG, who also sat in

the Cabinet as the government's legal advisor and representative of the judiciary within government; the Provincial Administration which managed the sub-national levels of government; and the Civil Service, which was headed by the Head of Civil Service, who was also the Secretary to the Cabinet. The new administration retained Charles Njonjo as the AG and accorded him the same powers over the rule of law institutions which he had wielded under the Jomo administration.[1]

As for the institutions for checking on the executive powers, the Moi administration had inherited the Independence Constitution, the judiciary, parliament, the electoral management body and the political opposition. However, the evolution of these institutions into proper functionality had been disrupted by the Jomo administration. The Independence Constitution had been heavily amended in a bid to centralise power in the presidency. The judiciary, parliament and the electoral management body, on the other hand, had been placed under the direct control of the AG, making the three institutions unable to function independent of executive control. As for the political opposition, it was virtually non-existent, having been banned from active existence under the Jomo administration.[2]

Although the Moi administration largely retained many of the institutions inherited from the Jomo administration as they had been under the previous administration, it began introducing changes to a few others which it deemed critical for its management of the country. Top on the list of these institutions were security sector agencies, which were subjected to significant changes between 1978 and 1985. The first security sector agency to undergo changes under the Moi administration was the Kenya Police Force. Changes within the Force targeted the Force's personnel, with several senior officers resigning from their posts and being replaced by the new administration's appointees. The administration justified the changes by informing parliament that the resignations were necessitated as part of cleaning up the Force to rid it of officers who had engaged in corruption and other illegal activities.[3]

The second security sector agency to witness similar changes was the national intelligence unit, popularly referred to as the Special Branch. The unit was mandated with carrying out intelligence gathering for purposes of promoting security in the country. The unit had been a department of the Kenya Police Force, headed by a deputy commissioner, but operating

[1] Ng'weno, 'Njonjo', *Makers of a Nation* series.
[2] 'Njonjo', *Kenya Yearbook 2010,* Kenya Editorial Board.
[3] Morton, *Moi,* 172; Ng'weno, 'Njonjo', *Makers of a Nation* series.

outside the supervision of the Force. The Jomo administration had legalised it in 1969, maintaining its independent mandate from the Force. The Moi administration reviewed this mandate in 1978, placing it at the centre of the administration and appointing James Kanyotu as its head. It became one of the most important agencies of governance under the administration.[4]

The final security sector agency to be targeted for change under the Moi administration was the Provincial Administration and took place in December 1979. Under the changes, the institution was placed under a new ministry called the Ministry of Provincial Administration and Internal Security. At the head of the new ministry was a minister and a permanent secretary. Holders of these positions became extremely powerful. Among them were G. G. Kariuki, Hezekiah Oyugi and Wilfred Kimalat.[5]

Outside the security sector, the Moi administration also targeted the State Law Office headed by the AG. It appointed the long-serving AG Charles Njonjo into the Cabinet as the Minister for Justice and Constitutional Affairs. The appointment came after Njonjo resigned as AG and was elected unopposed as MP for Kikuyu Constituency after the incumbent MP was prevailed upon to resign and pave way for Njonjo. As Minister, Njonjo retained the same power over the rule of law institutions, even using them to continue intimidating MPs, as was the case against Nyeri Town MP Waruru Kanja, who lost his seat for not surrendering foreign currency on coming back from a foreign trip.[6] Nevertheless, there was a slight difference in the nature of the power Njonjo wielded as AG and as Minister. As AG, Njonjo's position was an apolitical one which concentrated on the technical aspects of maintaining law and order across the country. As Minister on the other hand, he became the political head of a docket which housed the rule of law institutions across the country. This allowed him a substantial presence in parliament and in the larger political arena, where he pushed some of the most

[4] Gimode, 'Police', 239–251; G.P. Joshi et al., 'Police as a service Organisation: An agenda for change', *A Report of the Roundtable Conference on Police Reform in East Africa,* Commonwealth Human Rights Initiative (CHRI), April 2003, 10–14; Wachira, 'Wilson Boinett'; A. Murage, 'Nyati House the epicentre of torture', *Daily Nation,* 31 October 2019, 17.
[5] E. Omari, 'GG Kariuki, the man who never believed power had eluded him', *Daily Nation,* 3 July 2017, 27; K. Mungai, 'Confessions of a "Mwakenya" insider', *Daily Nation,* 14 February 2020, 29; N. Gisesa, 'For most security honchos, power is their second nature', *Sunday Nation,* 5 May 2019, 27; I. Byron and N. Gisesa, 'Hezekiah Oyugi: Teacher who became powerful administrator', *Daily Nation*, 30 September 2020, 26; J. Kamau, 'Hezekiah Oyugi project that still haunts government', *Sunday Nation*, 16 August 2020, 29.
[6] Odinga and Elderkin, *Raila*, 79.

fundamental constitutional changes in the early Moi era, prior to his purge by the administration in early 1983.[7]

The changes at the State Law Office opened up opportunity for others to emerge as AGs. Njonjo's immediate successor was James Karugu, who was appointed AG in April 1980 but resigned from the position in July 1981 under unexplained circumstances. It was later speculated that it was Minister Njonjo who instigated Karugu's resignation. This was reportedly in retaliation for the role which Karugu had played in a case of sedition involving Njonjo's relative, one Andrew Muthemba, which had given Njonjo negative publicity. Njonjo was also said to have been unhappy with his immediate successor's condemnation of a judge who had given a light sentence to an American marine who had murdered a Kenyan woman.[8]

Following Karugu's departure, Joseph Kamere took over as the new AG. Kamere's stint as AG lasted until December 1982, when he was replaced by Mathew Guy Muli during the purge of Njonjo's allies which came in the aftermath of the August 1982 coup.[9] Muli served until 1991 when he paved way for the elevation of Amos Wako, who became the longest serving AG in Kenya's history. Although none of Njonjo's successors wielded the same influence over the rule of law institutions as Njonjo had, the AG's office nonetheless remained an important tool through which the Moi administration managed the institutions.[10]

Outside the official administrative apparatus inherited from the Jomo administration, the Moi administration established a parallel, informal apparatus as a check on formal structures. Under this arrangement, the civil service and some of the security agencies co-existed alongside their parallel, informal versions. The main role of the informal structures was to provide vigilance on the operations of the formal structures. The informal structures were manned by faceless or nondescript people and elders chosen to represent ethnic groups and often wielded more power than formal structures.[11] Within the rule of law terrain, the Moi

[7] Karume and Gethoi, *Gold*, 230–245; Muluka, 'Njonjo'; 'Njonjo', *Kenya Yearbook 2010*.
[8] Morton, *Moi*, 199; K. G. Adar and I. M. Munyae, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978–2001', *African Studies Quarterly*, 5, No 1 (2001): 4; J. Kamau, 'James Karugu resigned as Attorney-General to start farming', *Daily Nation*, 17 February 2018, 29; *The Standard*, 'Intrigues that led to Charles Njonjo's fall from grace', 12 March 2017, 8.
[9] Ng'weno, 'Njonjo', *Makers of a Nation* series.
[10] Cockar, *Doings*, 123- 125; J. Kamau, 'History of love and political hate in the citadel of justice', *Sunday Nation*, 24 September 2017, 29; K. Ngotho, 'When Kenya was ruled through "fake news" peddled by State', *Sunday Nation*, 28 May 2017, 27; W. Menya, 'Wako: Is the lucky "angel" headed for a fall?' *Sunday Nation*, 24 November 2019, 26.
[11] Morton, *Moi*, 177; 'Moi's Cabinets and unending intrigues', *Daily Nation*, 12 February 2020, 16–17; K. Ngotho, 'How Moi worked around trust issues to rule for 24 years', *Sunday Nation*, 1 December 2019, 27; K.

administration initially left the institutions untouched, largely retaining their status as inherited from the preceding Jomo administration. The Constitution for instance remained unchanged for the first four years of the Moi administration. However, under emerging pressure from various social forces, the administration turned to the institutions and started adjusting them in order to use them in stemming off pressure and tightening its hold onto power.

Constitutional Rule under Moi's One-Party Administration

The first rule of law institution to be targeted for change was the Constitution. The administration introduced the Constitution of Kenya (Amendment) Bill and the Election Laws Amendment Bill, both of 1982. The two bills were drafted in response to attempts by veteran opposition leader Jaramogi Oginga Odinga and others to form a political party to challenge KANU.[12] Parliament agreed to the amendments and enacted the proposed changes in the Constitution in June 1982. Together, the changes introduced Section 2A in the Constitution. The Section provided that "(T)here shall be in Kenya only one political party, the Kenya African National Union."[13] With this change, political opposition was officially outlawed in the country.[14]

In December 1986, the Moi administration revisited the Constitution with a new amendment. The amendment directly targeted checks and balances institutions by abolishing the security of tenure for heads of these institutions. The institutions targeted were the offices of the Auditor-General and the Attorney-General.[15] In 1988, the Moi administration extended the abolition of security of tenure to cover judicial officials. This time round, the administration removed security of tenure for judges of the High Court and the Court of Appeal by amending the constitution through the Constitution of Kenya (Amendment) Act No. 4 of 1988.[16] At about the same time, the administration enacted constitutional amendments targeting the electoral process in the country. This was in anticipation of the 1988 general election. The change abolished secret balloting and replaced it with an open queue-voting system. It set up a new system of electing leaders where voters had to physically queue

Ngotho, 'When editors lived in perpetual fear of Daniel Moi's phone calls', *Sunday Nation*, 15 October 2017, 27; Awori, *Tiger*, 154–155; J. Sigei, 'Moi's mistakes were largely tied to survival', *Daily Nation*, 12 February 2020, 16–17.

[12] Odinga and Elderkin, *Raila*, 90–91; Kituku, 'Doomed', 41–43.

[13] Mpaka, 'People', 4–10.

[14] Karume and Gethoi, *Gold*, 236.

[15] Kibwana, Wanjala and Owiti, *Corruption*, 65–74; Nowrojee, 'Profession', 41.

[16] Nowrojee, Ibid.

behind their preferred candidates instead of choosing them secretly as had been the case in previous elections.[17]

Further amendments introduced to the Constitution by the Moi administration targeted the Bill of Rights, which the administration worked to expunge from the Constitution. The amendments were enacted mainly through the judiciary and took place in 1982 and 1989. In 1982, the amendment involved the elevation of the Preservation of Public Security Act (1966) above the Bill of Rights. This was the main outcome from a ruling by Justice Allan Hancox in a case involving the detention of Stephen Mwangi Muriithi, the administration's first detainee.[18] Muriithi's lawyers had argued that the detention was unconstitutional since it violated the Bill of Rights. Justice Hancox's ruling was later affirmed by Court of Appeal judge Justice Zacchaeus Chesoni, thus cementing the superiority of the Act over the Bill of Rights.[19] The 1989 amendment was enacted by two High Court judges, Norbury Dugdale and Cecil Miller. The two judges declared that the Bill of Rights was unenforceable. With the ruling, it became impossible for Kenyans to cite the Bill of Rights in protecting themselves against the excesses of the Moi administration, including arbitrary arrest and indefinite detention.[20]

Checks and Balances under Moi's One-Party Administration

Judiciary

The judiciary was at the centre of the profound amendments against the Bill of Rights, which the Moi administration undertook. This was mainly due to its subversion to the executive, a practice which the Moi administration picked up and escalated from the Jomo administration. When the Moi administration ascended into power, the judiciary was still bankrolled by the British government. This ensured that the British government continued enjoying significant

[17] K. Kibwana, 'Lessons we can learn from Ndingi's humble life', *Sunday Nation,* 12 April 2020, 24; K. Ngotho, 'Tough DC who forced school head to shave in public without sanitiser', *Sunday Nation,* 2 August 2020, 32; 'Charles Rubia, reformist leader who paid dearly for seeking change', *Sunday Nation,* 29 December 2019, 34; K. Ngotho, 'When Kanu power barons used to think for Kenyans', *Sunday Nation,* 23 February 2020, 34.

[18] In a TV interview with one of the Kenyan media houses, veteran politician Martin Shikuku contested the presumption that Stephen Muriithi was the first detainee under Moi. He argued that although he (Shikuku) and others had been detained on the orders of President Jomo Kenyatta, Moi held onto the decision in the first three months of his presidency, and this made Shikuku and the other detainees from the Kenyatta era the first detainees under Moi.

[19] Odinga and Elderkin, *Raila*, 142; J. Kamau, 'Ex-intelligence boss Mwangi Muriithi's failed bid to get justice', *Sunday Nation,* 9 December 2018, 27; J. Kamau, 'British swindler who was involved in Kenyan media fights', *Daily Nation,* 5 July 2020, 29.

[20] Kamau, 'Swindler'.

influence over the institution, especially in the appointment and maintenance of the dominance of expatriate judges within it.[21] Although the Moi administration lived with the British influence, it nevertheless asserted its own influence on the judiciary. This in turn gave the institution at least three distinctive features. The first feature related to the judiciary's position within the hierarchy of power under the Moi government. Not only did the President assume the chairmanship of the Judicial Service Commission (JSC) in 1986,[22] but the government also elevated the ruling party KANU above judicial scrutiny. This was in response to a case filed in the courts by politician George Anyona to challenge KANU's decision to ban former KPU politicians from participating in the 1979 election.[23]

The second feature which the judiciary acquired under the Moi administration consisted of rulings which the institution made in favour of the administration. Rather than indicate the judiciary's independence from the executive and promote the rule of law, most of the rulings demonstrated the judiciary's subservience to the administration and undermined the rule of law.[24] Apart from rulings against the Bill of Rights, including those already cited and others made in subsequent rulings, there were at least five other rulings which were clearly meant to favour the administration rather than serve the course of justice. The first ruling involved challenges mounted by lawyers and opposition politicians against the 1982 Section 2A of the Constitution. Lawyers Gitobu Imanyara and James Orengo questioned the legality of the Section, with Orengo further demanding that Justice Norbury Dugdale who was presiding over the case recuses himself because of his perceived bias in the case. Justice Dugdale ruled against both demands.[25]

The second ruling involved an application filed by lawyer Paul Muite in mid-1991 demanding to pay a physical visit to Nyayo House in the Nairobi Central Business District (CBD) to verify if it housed the infamous torture chambers. The judiciary rejected the application, citing the Restricted Areas Act.[26] The third case involved the Judicial Commission of Inquiry set up to investigate the Justice and Constitutional Affairs Minister

[21] Cockar, *Doings, 208.*
[22] B. Bedasso, 'Lords of Uhuru: The Political Economy of Elite Competition and Institutional Change in post-independence Kenya', Working Paper 042 (UNU-MERIT 2012), 31.
[23] J. Kamau, 'How Moi kicked off torture era to rattle dissidents', *Daily Nation*, 14 February 2020, 31; W. Mitullah, 'Development Ideals and Reality: Bridging the Kenya Gap through Devolution', *Maseno University Journal* 1, (2012): 110; Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002.
[24] E. Kibet and C. Fombad, 'Transformative Constitutionalism and the adjudication of constitutional rights in Africa', *African Human Rights Law Journal*, No. 17 (2017): 345–346; Cockar, *Doings*, 187-209.
[25] Odinga and Elderkin, *Raila*, 163.
[26] Ibid, 158; Mirugi Kariuki, Oral interview, 12/08/2002.

and former AG Charles Njonjo when he was accused of engaging in treacherous activities against the Moi administration, the so-called 'traitor' affair. Presided over by three judges led by Justice Cecil Miller, the Commission commenced hearings on 26 June 1983. It found Njonjo guilty of charges laid against him, with its findings made public on Jamhuri Day in 1984.[27] Although the process took on the form of a judicial inquiry, its main aim was to facilitate the purging of Njonjo from the Moi administration. It thus demonstrated the complicity of the judiciary in the schemes set up by the administration against political rivals. Miller would later be promoted to become the Chief Justice, and his tenure would be marked by continued subservience of the judiciary to the executive.[28]

The fourth case involved the 1989 fight to save Uhuru Park in the Nairobi central business district from annexation to create a 60-storey headquarters for the KANU-affiliated Kenya Times Media Trust (KTMT). In the case, activists under the banner of the Green Belt Movement led by environmentalist Wangari Maathai had filed a lawsuit at the High Court to bar KTMT from annexing the Park. The judiciary, through Justice Dugdale ruled that as private citizens, the activists had no locus standi to sue on behalf of the public, with the power to sue exclusively vested in the AG. This ruling had negative implications for public interest litigation.[29]

The third feature, which evolved in the judiciary under the Moi administration, involved the cultivation of both hostile and cosy relations between the administration and a number of individual judicial officials. Whereas those individual judicial officials targeted for hostile attention were mostly those associated with acts aimed at promoting the rule of law and upholding judicial independence, those favoured became important agents of the administration within the institution. Among judges targeted for hostile attention included Justice Derek Schofield, whose contract was not renewed when it came up for renewal in 1987. The judge had angered the Moi administration when he ordered the CID to comply with an order to produce one Stephen Mbaraka Karanja who had disappeared after being arrested by the CID. The pressure which Justice Schofield placed on the CID to comply with

[27] J. Kamau, 'How Daniel Moi brought down "traitor" Charles Njonjo', *Daily Nation*, 5 January 2022, 29; G. Osen, 'Inside Njonjo's bid to marshal 125 MPs to topple President Moi', *The Star*, 3 January 2022, 7; Ng'weno, 'Njonjo', *Makers of a Nation* series; D. Khaemba, 'Francis Mutwol: The man who fell Njonjo', *KTN News Kenya*, YouTube video, August 29, 2021, 07.02, https://www.youtube.com/watch?v=Bjg0H0aXV6Y; 'Hon. Paul Muite', *Mentorship Web Series*.
[28] Morton, *Moi*, 199-202; Cockar, *Doings*, 141–173; J. Wangui, 'Charles Njonjo turns 100, thanks family', *Daily Nation*, 23 January 2020, 5; 'Njonjo', *Kenya Yearbook 2010.*
[29] Kamau, 'Swindler'.

his order prompted intervention from then Chief Justice Cecil Miller, who told Schofield to halt the pressure he was applying on the CID ostensibly because the President had become personally interested in the matter.

A second judge who received similar treatment was Justice Frank Shields, who had angered the administration in 1990 when he lifted a ban on the pro-Opposition monthly publication, *The Nairobi Law Monthly*. The administration responded to Shields' ruling by putting pressure on then Chief Justice Alan Hancox to order a raid on the Judicial Registry and take statements from Registry staff, accusing them of having taken bribes from the publication's lawyers. He also had Shields questioned over the ruling, but later abandoned the investigations without further questions.

Other judges who faced hostile action from the Moi administration were Justice John Khamoni and Justice Chunilal Madan. For Khamoni, he was prevented from attending the 1999 LSK ceremony in his honour, having been nominated for the LSK award for distinguished service for displaying independence in his rulings. As for Madan, he was kept acting as Chief Justice for close to a year without being confirmed in the position. This was apparently due to the administration's fear of Madan's independent streak.[30]

On the other hand, judicial officials favoured by the administration acted in ways which were aimed at pleasing the administration. In one such case, a judge wrote a PhD thesis in which he advocated for extra-constitutional powers for African presidents, a perspective which largely mirrored the KANU party line with regard to the powers it wished to have the President exercise.[31] In another case, a favoured judge reported how he had been instructed by the President to be paying him weekly visits, ostensibly to be guided on rulings which involved sensitive land and ethnic issues.[32] In addition, the administration established a small clique of judges which it repeatedly tapped for favourable rulings. The clique employed legal technicalities to pass judgments which favoured the administration, as was the case against electoral petitions challenging the Moi administration's electoral victories. On the one hand, the clique presided over cases in which opponents of the administration were tortured, and on

[30] Nowrojee, 'Profession', 43–46.
[31] A. Abdullahi, 'J. B. Ojwang: The man, the myth and the reality', *The Nairobi Law Monthly* 11, No. 2 (2019): 32-35; K. Kibwana, 'Legal limits of Executive power in the African one-party state', *The Nairobi Law Monthly* 11, No. 2 (2019): 37–43.
[32] Cockar, *Doings*, 122.

the other hand, it made rulings which absolved top personalities in the administration from mega scandals such as the Goldenberg scandal of 1992.[33]

Parliament

Parliament was among the rule of law institutions which attracted keen interest from the Moi administration. The institution had been significantly weakened by the time of the administration's ascendancy into power. This was largely through the actions of AG Njonjo against vocal backbenchers, most notably the so-called 'Seven Bearded Sisters' during the preceding Jomo era. Nonetheless, there still remained vestiges of independence within the parliament of the early Moi era. This was exhibited in the continued activities of radical backbenchers such as Koigi wa Wamwere, who as the chairman of the parliamentary Public Accounts Committee (PAC) in 1979, he attempted to forge an alliance with the academia through a lecture at the University of Nairobi in which he intended to elaborate on the role of parliament in independent Kenya. The Moi administration prohibited the lecture and forced Koigi to resign from the PAC.[34]

After the 1979 election in which Kenya had its first post-Jomo Kenyatta parliament, the Moi administration laid out what it expected of the new parliament. This amounted to having the new parliament 'sing after (President Moi) like parrots.'[35] To turn this into reality, the administration embarked on at least two main actions against parliament. The first action consisted of outright hostility towards any independent-minded parliamentarians. It forced these parliamentarians out of the House either through electoral manipulation, detention or exile. Among those kept out of parliament through manipulation of the electoral system were Jaramogi Oginga Odinga, Kihika Kimani and Masinde Muliro. Among those detained were George Anyona and Koigi Wa Wamwere. Among those exiled were James Orengo and Chelagat Mutai.[36]

The second action consisted of turning parliament into a platform for carrying out the administration's wishes. From 1979 until the return of a multi-party parliament in Kenya in early 1993, parliament was active in not only passing laws and endorsing controversial

[33] L. Franceschi, et al, 'A history of state capture in Kenya: The Goldenberg Scandal', *Daily Nation*, 21 November 2019, 27; Kamau, 'Citadel'; B. Wambugu, 'Top judges whose conduct was found wanting as "mtukufu" era faded', *Daily Nation*, 8 February 2020, 24.
[34] Wamwere, 'Nyayoism'; K. Ngotho, 'Torture'.
[35] K. Ngotho, 'Turks'.
[36] Wamwere, 'Nyayoism'; 'Masinde Muliro', *Kenya Yearbook 2010*, Kenya Editorial Board; Kamau, 'Sanitiser'; Omari, 'GG Kariuki'; K. Ngotho, 'Turks'.

projects, but also in staging performances in total support of the administration.[37] Among the laws which parliament passed to enhance the administration's powers, two of the most outstanding were the constitutional amendments of June 1982 which introduced Section 2A which outlawed the political opposition, and those amendments which came between 1986 and 1988 which abolished security of tenure for a number of checks and balances institutions. Both sets of constitutional amendments were passed without any significant opposition in parliament, with Starehe MP Charles Rubia and Limuru MP Jonathan Njenga being the only two parliamentarians to oppose the latter set of constitutional amendments. Even this mild opposition attracted the wrath of the administration, and it tried to instigate the removal of Njenga from parliament through suspending him from KANU.[38] Among controversial projects endorsed by parliament included the Turkwell dam, which had been initiated without due process and under a cloud of corruption.[39]

In terms of performances aimed at pleasing the administration, this mainly involved installing in parliament two types of personalities. The first type consisted of senior personalities within the Moi administration who were so powerful that they had parliamentarians standing up for them whenever they appeared. The second type of personalities consisted of ultra-loyal parliamentarians who went to great lengths to prove loyalty to the Moi administration both in and outside parliament. Both sets of personalities became useful in turning parliament into a stage for performances in support of the administration and in making the institution pliant towards the administration.[40] The performances usually involved pausing normal parliamentary business to mostly denounce a contemporary activity deemed negative by the administration.

Among performances staged in this way included the June 1983 denunciation of a PCEA church elder in Kikuyu Constituency for supporting then disgraced Minister Charles Njonjo; the April 1989 ousting of Vice President Josephat Karanja; the 1980 call for the detention of veteran editor George Githii and banning of the *Standard* newspaper where he was working at the time for having turned against detention without trial which he had earlier justified; the highly personalised attacks against Wangari Maathai for opposing the annexation of Uhuru

[37] Kibwana, Wanjala and Owiti, *Corruption*, 76–79.
[38] Karume and Gethoi, *Gold*, 246–249; W. K. Ochieng, 'The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya', *Kabarak Journal of Law and Ethics*, 4 (2019): 137.
[39] Nyachae, *Corridors*, 94–95; Maina, *State Capture*, 13; K. Ngotho, 'Turkwel dam: Moi-era project that parallels Arror, Kimwarer', *Daily Nation*, 1 March 2019, 29.
[40] Omari, 'G. G. Kariuki'.

Park in 1989; and the 1990 denunciation of Kenneth Matiba, Charles Rubia and others for agitating for a return to political pluralism.[41]

As a result of the administration's influence on parliament, the quality of parliament's performance as an oversight institution was severely affected, with perhaps the Sixth parliament which arose out of the controversial 1988 elections being the most affected.[42] The performance only improved with the re-introduction of political pluralism in the early 1990s.[43]

The Electoral Management System

The electoral management system was the fourth rule of law institution targeted under the Moi administration. The preceding Jomo administration had tightly controlled the system, placing it under the direct control of the executive, with the AG appointing the election supervisor, while district commissioners acted as election returning officers. The Moi administration largely maintained this system, and only reformed it from 1991 under opposition pressure after repeal of Section 2A of the constitution. Prior to the reform, the system helped the Moi administration to turn elections into a mechanism for dealing with political opponents, rather than as a means for subjecting the state to public scrutiny and restraint.[44]

The first election under the Moi administration held in 1979 exhibited at least three elements which showed that it was being deployed by the administration as a mechanism for dealing with potential rivals, rather than as a means for subjecting the administration to popular restraint. These elements were lack of transparency, barring of disfavoured candidates and propping up of favoured candidates. The lack of transparency was exhibited in the administration's rejection of the offer by *The Weekly Review* to run opinion polls. The magazine suggested the opinion polls as a way of predicting the likely outcome of the

[41] Odinga and Elderkin, *Raila,* 94; Awori, *Tiger*, 156–157; E. Wainaina, 'Curtain falls on Njonjo's "limping sheep" church elder Samuel Githegi', *Sunday Nation*, 21 May 2017, 33; 'How Moi brought down his VPs', *Daily Nation,* 5 February 2020, 28; D. Aduda, 'The quick rise and swift fall of Josephat Karanja as VP', *Daily Nation*, 12 March 2020, 14; Odinga and Elderkin, *Raila*, 93; Kamau, 'Swindler'; J. Kamau, 'How Kalonzo led Kanu politicians in vicious attack against Matiba', *Daily Nation,* 21 April 2018, 31.
[42] Ojwang', 'Government', 156.
[43] Odinga and Elderkin, *Raila*, 165.
[44] Maina, *State Capture,* 27; K. Ngotho, 'Sanitiser'; K. Ngotho, 'When Kanu power barons used to think for Kenyans', *Sunday Nation*, 23 February 2020, 30.

elections and how individual candidates would fair. The Moi administration forced the magazine to drop the initiative by threatening to withdraw advertising revenue from it.[45]

The barring of disfavoured candidates was most exhibited in the treatment of former Vice President Jaramogi Oginga Odinga. Under the influence of the long-serving AG Charles Njonjo, the Moi administration put up a requirement which demanded that both Odinga and those he had been with in the KPU get clearance from KANU to participate in the 1979 election, the first under the administration. Although the KANU Secretary General Robert Matano had allowed the ex-KPU politicians to run for elective office, the AG countermanded him in announcing new requirements for the ex-KPU candidates led by Odinga. For Odinga in particular, the administration demanded that he sit a Kiswahili language examination before he could be allowed to contest the Bondo parliamentary seat. He was eventually barred from participating in the election.[46]

On the other hand, the propping up of favourite candidates was exhibited in the emergence of politicians such as Nicholas Biwott, Koigi wa Wamwere and Kitale Mayor Fidelis Gumo. Biwott was elected unopposed after his rival Stanley Kurgat withdrew from the race upon being promised a parastatal job. For Koigi wa Wamwere, he received the administration's tacit support to defeat veteran politician Kihika Kimani in the Nakuru North constituency.[47] As for Gumo, he defeated veteran politician Masinde Muliro under controversial circumstances.[48]

The lack of transparency, rigging out disfavoured politicians and propping up of favourite candidates were to become frequent features of subsequent elections under the Moi administration. In the second election under the administration held in 1983, the so-called snap election, the features were strongly manifested, resulting in losses of parliamentary positions for politicians affiliated to the now disgraced Minister Charles Njonjo.[49] However, a new additional element emerged, involving the use of state agents to harass those disfavoured politicians who still managed to emerge victorious in spite of the administration's opposition to their candidature. This was exhibited in the fate of veteran politician Muliro, who having

[45] J. Kamau, 'The history of mistrusting opinion polls', *Daily Nation*, 29 July 2017, 32.
[46] Odera, *Confidant*, 140–141; Morton, *Moi*, 174; Odinga and Elderkin, *Raila*, 72-73; Ng'weno, 'Njonjo', *Makers of a Nation* series.
[47] Morton, *Moi*, 174; Wamwere, 'Nyayoism'.
[48] 'Masinde Muliro', *Kenya Yearbook 2010*, Kenya Editorial Board.
[49] Omari, 'G. G. Kariuki'; Mirugi Kariuki, Oral interview, 12/08/2002.

managed to defeat Gumo in the 1983 election, had his private businesses suffer from politically instigated pressure.[50]

In the administration's third election in 1988, it introduced perhaps the most far-reaching change to the country's electoral system. This was the queue-voting system, where voters were made to queue behind their preferred candidates in the election.[51] The change eliminated the element of secrecy in the choices which voters made, thus allowing the administration to intimidate them into voting for candidates whom it preferred. It was mostly meant to intimidate voters against voting for politicians who the administration had fallen out with.

Although the rule received heavy criticism from the Church and other vertical accountability actors including the LSK, it was nonetheless enacted. Using district commissioners to disrupt the queues of disfavoured politicians, the new electoral rule helped the Moi administration get rid of a number of disfavoured politicians, with the key target being Vice President Mwai Kibaki, who nevertheless survived by winning the Othaya Constituency seat.[52] In addition to abolishing secrecy in voter choices, the administration also engaged in gerrymandering in which it manipulated electoral boundaries to create constituencies where favoured candidates could easily win, while disfavoured candidates could easily lose. This was the case, for instance, in the Kitale East Constituency, where the administration created a new Cherangany Constituency. The new constituency elevated the Kalenjin community into a voting majority, thus placing veteran politician Masinde Muliro, who came from the now-minoritised Luyia community, at a disadvantage. Muliro initially overcame this disadvantage by emerging victorious in the election. However, the election was shortly nullified and in the subsequent repeat election, he lost to newcomer Kipruto Kirwa.[53]

The Political Opposition

The final formal checks and balances institution which the Moi administration contended with was the political opposition. Much like the other four checks and balances institutions which the Moi administration inherited from the Jomo administration under various degrees of frailty, the political opposition which the Moi administration inherited was weak as a

[50] 'Masinde Muliro', *Kenya Yearbook 2010,* Kenya Editorial Board.
[51] Odinga and Elderkin, *Raila,* 133–135; Awori, *Tiger,* 158.
[52] Karume and Gethoi, *Gold*, 171; Kibwana, 'Ndingi'; K. Ngotho, 'Sanitiser'; 'Charles Rubia', *Sunday Nation*; K. Ngotho, 'Barons'.
[53] 'Masinde Muliro', *Kenya Yearbook 2010,* Kenya Editorial Board.

checks and balances mechanism against the administration. The opposition had been significantly weakened with the banning of the KPU in 1969 and detention of up to 28 politicians affiliated to it by the time the administration assumed power in August 1978. The administration released the detainees from prison three months after assuming power.[54]

Despite releasing the detainees, the Moi administration remained ambivalent towards the group. In fact, the administration considered the group of detainees, along with two other groups, that is, the GEMA group which had championed the Change-the-Constitution movement to bar the Vice President from automatically assuming power upon the indisposition of President Jomo Kenyatta, and the 'Seven Bearded Sisters' consisting of a few vocal backbenchers, as the likely sources of opposition in its earlier years in power. It went ahead to deal with the three groups.

On the other hand, the Moi administration re-imposed the Jomo-era restrictions on the group of released political detainees. By May 1982 for instance, the administration had ordered the expulsion of Oginga Odinga, the leader of the group, from KANU and his confinement to Kisumu for differences over military policy and for having allegedly denounced President Jomo Kenyatta as a land grabber. Later after the August 1982 coup, it ordered his house arrest for suspicion of participating in the coup.[55]

As for the Change-the-Constitution movement, only a few months after the Moi administration ascended to power in late 1978, Kihika Kimani, one of the leaders of the movement, fled to Tanzania.[56] Similar flights to exile followed members of the 'Seven Bearded Sisters.' Those from the group who fled to exile included James Orengo and Chelagat Mutai who went to Tanzania, as well as Koigi wa Wamwere[57] who went to Sweden.[58]

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[54] Morton, *Moi*, 171; 'Martin Shikuku', *Capital Talk*, K24 TV; J. Kamau, 'Torture'.
[55] Odera, *Confidant*, 149–156; Morton, *Moi*, 185.
[56] K. Some, 'Rift Valley police boss Mungai did not slap Moi: Lee Njiru', *Daily Nation*, 31 March 2018, 15; J. Kamau, 'How three men experienced Moi's face of wrath', *Sunday Nation*, 9 February 2020, 9; Kamau, 'Torture'.
[57] In a Facebook post on 6 December 2017, blogger Levin Odhiambo Opiyo claimed that Kihika Kimani did not return to Kenya on his own volition but was part of a dissident 'exchange' package between Kenya and Tanzania, in which Kenya repatriated to Tanzania a number of anti-Nyerere dissidents in exchange for Kenyan dissidents, prominent among them the 1982 coup mastermind Senior Private Hezekiah Ochuka and his co-plotter Private Pancreas Oteyo. Others repatriated at the same time included two of the radical parliamentarians, James Orengo and Chelagat Mutai, who Moi had exiled. The UN High Commissioner for Refugees reportedly condemned the exchange.
[58] Mirugi Kariuki, Oral interview, 12/08/2002.

After neutralising the three Jomo-era political groups, the Moi administration turned its focus on two types of potential political opposition. The first group consisted of perceived rivals within the administration. The most prominent target in the group was the Justice and Constitutional Affairs Minister Charles Njonjo. The second group consisted of political agitators outside the formal political system comprising the different groups which emerged to challenge the administration, among them coup plotters behind the 1982 attempted coup, academics, underground movements and politicians who had been banished from active politics through detention and expulsion from KANU. In dealing with both groups, the administration used a combination of at least three main methods, in addition to the electoral manipulation outlined above. These included the deployment of state institutions to neutralise perceived opponents, re-introduction of detention without trial and ultimately the elevation of KANU into the only legal political party in the country.

Deployment of state institutions to neutralise perceived opponents was mainly witnessed in the administration's handling of Njonjo, where parliament was mobilised to denounce him as a traitor,[59] the AG's office investigated him, and a judicial commission of inquiry found him guilty of charges laid against him and had him banished from political activities.[60] As for the re-introduction of detention without trial, the first Moi-era detainees were Stephen Muriithi, John Khaminwa and George Anyona. The list of detainees was later expanded to include suspects in the 1982 coup plot. Later still, it was extended to critical academics, university students, suspected members of underground dissident movements such as Muungano wa Wazalendo wa Kuikomboa Kenya (Mwakenya) and campaigners for political pluralism in the early 1990s.[61]

It was, however, the elevation of KANU into the only legal political party in Kenya which was the main method through which the Moi administration managed the political opposition, with the other methods only being deployed to support it. The elevation of the party happened in three steps. First, in May 1982, the administration legalised KANU's status as the only

[59] 'One on One Interview with Martin Shikuku', *KTN News Kenya*; Khaemba, 'Mutwol'.
[60] Odinga and Elderkin, *Raila*, 116–119; K. Ngotho, '"fake news"'; Njonjo, 'Westminster'; 'Njonjo', *Kenya Yearbook 2010*, Kenya Editorial Board, *Njonjo*; K. Ngotho, 'A tale of a 'traitor' and a VP', *Daily Nation*, 3 June 2017, 25; K. Tanui, 'Day G.G. Kariuki watched Moi through binoculars from house's balcony', *The Standard*, 7 July 2017, 6.
[61] Owiti and Mbaya, 'Order', 56; S. Munyiri, 'Stephen Muriithi: Ex-spy chief who started career in handcuffs', *Daily Nation*, 1 July 2021, 12; Odinga and Elderkin, *Raila*, 90; Gimode, 'Police', 244; Morton, *Moi*, 238; '"Disgraced" General Peter Kariuki continues search for justice', *Daily Nation*, 2 March 2020, 3; K. Ngotho, '"fake news"'; N. Gisesa, 'Karimi Nduthu, Mwakenya leader who remained defiant to his brutal killing', *Daily Nation*, 25 March 2021, 10.

legal political party in the country by forcing through parliament an amendment to the Constitution by inserting within it a Section 2A.[62] Secondly, the administration structured the party by widening its administrative reach across the entire country. The structure mirrored the administrative structure of the state, running from the sub-locational level to the highest national level. With this structure, the administration was able to neutralise political ambitions within KANU by making all positions, except that of the President, contestable and therefore insecure.[63]

Thirdly, the administration set up at least two powerful structures to operationalise the dominance of the party across the country. These were the Ministry of National Guidance and Political Affairs and the KANU Disciplinary Committee. Whereas the Ministry propagated the party's ideology across the country, the Disciplinary Committee enforced discipline in the party, ensuring everyone, with the exception of the President, toed the party line. By 1989, the Committee had expelled as many as 30 top officials from the party.[64]

Facing prohibition from KANU which was the only legal political party in the country, many politicians began agitating for reform and expansion of the political space. The agitation took on two main forms. The first form involved underground organisation through dissident movements. Among the most prominent movements to emerge during this phase was the Mwakenya group associated with university lecturers and students.[65] A second more visible form of agitation was organised by some of the politicians who had been expelled from KANU. The first movement to this extent emerged in 1989 and was associated with two veteran politicians, Oginga Odinga and George Anyona.[66] It shortly evolved into the Saba Saba political movement. This was after two former Cabinet Ministers in the Moi administration who had been expelled from KANU, Kenneth Matiba and Charles Rubia, announced on 4 July 1990 plans to hold a political rally on 7 July 1990 to demand for a return to political pluralism.[67] The administration responded by detaining the two leaders. With their detention, new leaders of the movement emerged, among them Njeru Kathangu, Ngotho wa

[62] Mpaka, 'People', 4–9.
[63] 'KANU Elections', *Daily Nation*, 20 September 1988, 1.
[64] Awori, *Tiger*, 162–164; 'The Kanu Men that Ruled Regions during Moi Era', *Daily Nation*, 7 February 2020, 6; 'Charles Rubia', *Sunday Nation*, 29 December 2019, 34.
[65] Can be translated into English as Patriots' Union for the Liberation of Kenya; K. Mungai, 'Confessions of a "Mwakenya" Insider', *Daily Nation*, 14 February 2020, 12.
[66] Odera, *Confidant*, 169–175.
[67] Odinga and Elderkin, *Raila*, 144–156.

Kariuki, Edward Oyugi and Kariuki Gathithu. The new leadership continued agitating for a return to political pluralism.[68]

Another political movement which emerged to agitate for political freedom was the Release Political Prisoners (RPP) group. The group was composed mainly of mothers of political prisoners imprisoned under the Moi administration. They staged a physical sit-in at Freedom Corner within Uhuru Park in the Nairobi Central Business District, going on a hunger strike and holding daily prayers at the nearby All Saints Cathedral Anglican Church to demand for the release of their jailed sons. The group's sit-in attracted support from other pressure groups, including the Forum for Restoration of Democracy (FORD) which had emerged to replace the Saba Saba movement as the main organised political pressure group and CSOs such as the National Council of Women of Kenya and the Green Belt movement led by Wangari Maathai. The group's work resulted in the release of the first political prisoners in June 1992 and all political prisoners by January 1993.[69]

Due Process under Moi's One-Party Administration

Away from disregarding both the constitution and checks and balances, the Moi administration had similar disregard for due process as a core principle of the rule of law. This was in two main ways. First, it continued the practice from the Jomo-era of deploying extra-judicial executions and political assassinations as a tool for political management. The most high-profile assassination under the administration was that of Foreign Affairs Minister Robert John Ouko in February 1990. The official explanation for the death was roundly rejected by college and university students who protested across the country's major cities. In spite of high-profile arrests on 21 November 1991 of powerful Cabinet Minister Nicholas Biwott and Internal Security Permanent Secretary Hezekiah Oyugi as prime suspects and inquests led by local and foreign detectives, a parliamentary committee of inquiry as well as a judicial commission of inquiry, the truth behind the assassination was never fully established.[70]

[68] S. Wanjala and K. Kibwana, eds., *Democratisation and Law Reform in Kenya* (Nairobi: Claripress Limited, 1997) 1-12; Awori, *Tiger*, 203; N. Gisesa, 'Strength of purpose that birthed Saba Saba', *Daily Nation,* 7 July 2020, 7.

[69] K. Maichuhie, 'Unbowed Maathai stood against Moi and won', *Daily Nation,* 11 February 2020, 10.

[70] Morton, *Moi,* 220–230; D. W. Cohen, 'Reading the Minister's remains: investigations into the death of the Honourable Minister John Robert Ouko in Kenya, February 1990', Institute for Advanced Study and Research in the African Humanities, Northwestern University (1994): 14–18; K. Opanga, 'Chaos as mourners in Kisumu, Nairobi riot', *Daily Nation,* 24 February 1990, 3; C. Atemi, 'Ouko burial: How Moi's surprise attendance went

Besides Ouko's assassination, there were also unresolved murders under the administration's watch involving perceived political opponents. These included university student leaders Titus Adungosi (1988) and Solomon Muruli (1998), Christian clerics Alexander Muge (1990) and Father John Kaiser (2000) and legislator Tony Ndilinge (2001).[71] In addition to the unresolved murders, the administration was also implicated in at least two cases of mass murders. These were the Wagalla Massacre perpetrated in 1984 in Wajir District and the Muoroto Slums Massacre which took place in early 1990 in Muoroto slums in Nairobi City. Up to 3,000 men were killed during the Wagalla Massacre, which the government claimed was an operation to mop up illegal weapons. As for the Muoroto Massacre, this led to loss of an estimated 50 lives, after the Nairobi City Commission under the chairmanship of Fred Gumo ordered the demolition of the slums, located along Landhies Road in the City.[72]

The second way in which due process was not respected under the Moi administration was through detention and torture of perceived opponents. On the first Jamhuri Day it presided over on 12 December 1978, the administration released the Jomo -era detainees. However, the reprieve on detention without trial was to prove short-lived, for within three years, it had been re-introduced. Going beyond what had been established under the Jomo administration, the Moi administration expanded detention to embrace a new element of torture. It set up torture chambers, first within the headquarters of the Special Branch at Nyati House. It then shifted the chambers to Nyayo House, which also served as the provincial headquarters for Nairobi Province. Located within the Nairobi Central Business District, the two premises became the official headquarters for torturing perceived opponents of the administration.[73] Beyond Nairobi, the torture infrastructure was decentralised to Nakuru to a two-storey building called KANU House located on Mburu Gichua Road. The building served as a holding cell for perceived local opponents of KANU. It was also used to hold ordinary people

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south', *Daily Nation*, 6 February 2020, 4; K. Ngotho, 'Mystery of Ouko White House photograph', *Sunday Nation*, 10 September 2017, 23; M. Kubai, 'MTC students stage Ouko demo', *The Standard*, 24 February 1990, 1; H. Malalo, 'Mombasa students stage demo', *The Standard*, 24 February 1990, 2; 'Probe told of Moi visits to Oyugi home', *Daily Nation*, 16 October 2004, 5; B. Karama and F. Odiero, 'Hope fades as Ouko murder witnesses tumble', *The People*, 2 February 2015, 9.

[71] A. Wako, 'Unresolved murders during Moi's tenure', *The Star*, 6 February 2020, 6.

[72] B. Makong, '1984 Wagalla massacre: Moi's death reopens wounds', *Daily Nation*, 10 February 2020, 4; I. Oruko, 'Fred "Kaa ngumu" is back with 'clubs blazing', *Sunday Nation*, 16 February 2020, 5.

[73] Odinga and Elderkin, *Raila*, 139–143.

arrested for small infringements against the party, such as not standing when the party flag was either being raised or lowered.[74]

The purpose for torture was to extract confessions that could be used in formal judicial procedures to convict those arrested. Torture included physical beatings; denial of medical attention, food, sleep and rest; being given water contaminated with human waste; being pricked on private parts using heated pins, burning cigarette butts and hot water; being placed in a room teeming with ants and snakes; being constantly interrogated until one collapsed with exhaustion; being stripped naked and placed in waterlogged cells; and being forced to relieve oneself in the same water that one drunk when thirsty. Additional aspects included psychological torture such as being teased with mouth-watering food after days of starvation and being informed that harm would come to one's family if they did not confess to their alleged crimes.[75]

The administration used detention and torture against three main groups. The first group comprised of businessman Stephen Mwangi Muriithi, politician George Moseti Anyona and lawyer John Khaminwa, all who were detained between May and July 1982. The second group of detainees consisted of soldiers suspected of plotting and participating in the 1982 failed coup attempt.[76] Detention was gradually expanded beyond the initial two groups to embrace a wide variety of detainees. Among these were academics and students accused of being members of underground dissident movements such as Mwakenya and the February Eighteenth Movement, the political opposition including Jaramogi Oginga Odinga and Raila Odinga and their associates, former cabinet ministers Kenneth Matiba and Charles Rubia, and Muslim clerics Sheikh Mohamed Khalifa and Khalid Salim Ahmed aka Sheikh Balala.[77]

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[74] Gimode, 'Police', 250; A. Murage, 'Nyati House the epicentre of torture', *Daily Nation*, 31 October 2019, 8; F. Mureithi, 'Kanu "house of terror" in Nakuru to be auctioned', *Daily Nation*, 17 August 2019, 6.

[75] Friedrich Ebert Stiftung, *We Lived to Tell: The Nyayo House Story*, n.d. (Nairobi: Friedrich Ebert Stiftung) 33–48; Odinga and Elderkin, *Raila*, 97-98; Kinyatti, *Gun*, 4–8; D. Onjili, 'Wafula Buke: the man, his convictions and the price he paid', *The Nairobi Law Monthly* 11, No. 3 (2019): 66–67; Mungai, 'Confessions'; T. Osanjo, 'How Moi overruled Kanu hardliners to let Kibaki take over', *Daily Nation*, 5 February 2020, 6; T. Odhiambo, 'Two weeks in hell: A retake of Nyayo torture chambers', *Daily Nation*, 5 September 2015, 16; O. Obonyo, 'Tales of pain and survival in Daniel Moi torture cells', *Daily Nation*, 14 February 2020, 14; S. Kiplagat, 'State ordered to pay three lecturers Sh46m for torture', *Daily Nation*, 14 February 2019, 9; R. Gichuhi, 'The gallant spirit Moi killed in detention', *Daily Nation*, 5 July 2013, 13; O. Obonyo, 'Of the spirit of forgiveness and a murderous Moi regime', *Daily Nation*, 7 February 2020, 10.

[76] Ng'weno, 'Njonjo', *Makers of a Nation* series.

[77] Friedrich Ebert Stiftung, *Tell*, 21–26; Odinga and Elderkin, *Raila*, 129–132; J. Wangui, 'Ex-army man recalls lead-up to1982 failed coup', *Daily Nation*, 1 August 2019, 6; R. Gichuhi, 'How Ochuka's 1982 coup attempt changed Kenya', *Daily Nation*, 1 August 2020, 10; F. Mureithi, 'Retired soldier recalls intrigues of failed 1982 coup', *Daily Nation*, 1 August 2014, 12; 'We lived to tell 1982 coup story, says pilot who flew bomb plane',

Although the judiciary was involved in a number of instances of detention and torture of administration opponents, the involvement did not advance the respect for due process. The reason for this was that in trying and convicting administration opponents brought before it, the judiciary not only agreed to work outside hours, but also accepted confessions obtained through torture of suspects. The judiciary's involvement was thus more as an accomplice in the administration's mistreatment of opponents rather than as a competent and independent body as required by due process.[78]

Rule of Law under the Multi-party Era Moi Administration

The absence of the rule of law as exhibited in the disregard for constitutionalism, weak checks and balances and lack of consideration for due process under the Moi administration continued until the end of the administration's reign in late 2002. Nonetheless, the emergence of the good governance agenda in the late 1980s put pressure on the administration, calling on it to embrace the tenets of good governance, among which respect for the rule of law was an important component. The pressure came from both internal actors such as the church and the political opposition, and external actors, especially the US embassy and multilateral donors such as the International Monetary Fund (IMF) and the World Bank.[79] It resulted in significant changes in the relationship between the Moi administration and a number of rule of law institutions.

Constitution and the Multi-party Era Moi Administration

The first institution to undergo significant change due to the good governance pressure was the heavily amended 1963 Constitution. The Moi administration set up a constitutional review commission headed by the Vice President George Saitoti. The commission gathered public opinion across the country. It then made recommendations which demanded minimal

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Daily Nation, 31 July 2012, 12; S. Lone, 'How Moi went astray and the coup that failed', *Sunday Nation*, 16 February 2020, 13; M. Mutiga, 'The genesis of Moi's ruthless campaign against opponents', *Daily Nation*, 30 June 2012, 13; 'Detention saved Matiba from the sword of Kanu killers, says Edith', *Daily Nation*, 5 July 2013, 11; J. Nyairo, 'About music that Moi inspired and the songs that he muffled', *Daily Nation*, 8 February 2020, 6; J. Kamau, 'Legitimate and dubious ways Moi used to build empire', *Daily Nation*, 8 February 2020, 8; A. Njoka, 'Here are 22 men Moi detained or jailed', *Daily Nation*, 5 February 2020, 4-5; P. Langat, 'Millionaire paupers: Fired soldiers yet to receive court awards', *Daily Nation*, 31 July 2020, 2; Kamau, 'Ex-intelligence boss'; R. Oudia, 'Jaramogi aide's family wins Sh2m compensation', *Daily Nation*, 4 February 2019, 3; P. Muyanga, 'I am now truly Kenyan, Sheikh Balala says after victory', *Daily Nation*, 20 July 2018, 5; P. Muyanga, 'Sheikh Balala gets Sh6m in citizenship row', *Daily Nation*, 16 July 2018, 7; K. Samuel, 'Now Muslim cleric wants to sue State for loss of sight 27 years on', *Daily Nation*, 26 July 2018, 5.

[78] Mirugi Kariuki, Oral interview, 12/08/2002.

[79] Morton, *Moi*, 239–242.

changes to the constitution. The Moi administration ignored these recommendations and instead reversed some of the most controversial amendments which had been introduced into the Constitution.[80] The most important of these reversals was repealing at a KANU National Delegates Meeting on 3 December 1991 of Section 2A which the administration had introduced in the constitution in June 1982. The Section had outlawed the political opposition. With the reversal, political pluralism was officially allowed in the country.[81] In the immediate aftermath of the reversal of Section 2A, the new AG Amos Wako appointed several task forces to review various laws to align them to the new dispensation. A few of the changes proposed by the task forces were enacted between 1993 and 1997, among them changes to the electoral system.[82]

In early 1998, two parallel initiatives emerged with the aim of undertaking a significant change in the Constitution. The first initiative was led by CSOs and Faith-based Organisations (FBOs) under the joint leadership of Mutava Musyimi and Oki Ooko Ombaka. It was called the People's Constitution of Kenya, popularly referred to as the Ufungamano Initiative. The second initiative was spearheaded by parliament and was referred to as the Constitution of Kenya Review Commission (CKRC). By 2001, the two initiatives had been brought together under the leadership of exiled Kenyan constitutional scholar Yash Pal Ghai.[83] As a joint initiative, the CKRC collected views across the country and drafted a proposed new constitution, which it validated in a national constitutional conference at Bomas of Kenya in Nairobi. However, the conference was halted in October 2002 prior to concluding its work, thus leaving the country stuck with the heavily amended 1963 Constitution. It remained so until the end of the Moi administration in December 2002.[84]

Checks and Balances under the Multi-party Era Moi Administration

Electoral Management System

Beyond the constitution, a second rule of law institution which the good governance pressure of the early 1990s forced the Moi administration to change was the country's electoral management system. The first election after return to political pluralism in the country took

[80] Kiraitu Murungi, Oral Interview, 18 July 2002; Mwangi, *Constitution-Making*, 18–26; Kindiki, 'Constitution-Making', 7–11.
[81] K. Ngotho, 'Bloody Battles and Kasarani Meeting that Changed Kenya', *The Standard*, 5 December 2021, 29.
[82] Owiti and Mbaya, 'Order', 32; Odinga and Elderkin, *Raila*, 205; Kituku, *Doomed*, 43–50.
[83] Mwangi, *Constitution-Making*, 27–35; Odinga and Elderkin, *Raila*, 282–289; Gachoka, 'Charles Njonjo'.
[84] Nasong'o, 'Rules', 45–48; Gitari, *Troubled*, 279.

place in December 1992. Unlike previous elections, which were presided over by the AG's office with district commissioners as returning officers, the 1992 election was presided over by a newly reinstated ECK. First set up by both the Maudling and Independence constitutions just prior to independence in 1963 before being dismantled by the Jomo administration, the newly reinstated ECK was expected to be independent of ruling party interference in order to provide an even playing field for all the political parties which were participating in the election.[85] However, the reinstatement of the ECK did not significantly make the electoral process sufficiently neutral in ways which could boost fair competition between the ruling party KANU and the political opposition.

The Moi administration itself engaged in at least three sets of actions which tilted the electoral process in its favour, using the advantage of incumbency. The first action involved use of the state machinery to gain electoral advantage. This consisted of directly controlling the ECK, plundering state resources to finance the administration's campaign and deploying key state institutions such as the judiciary in ways which helped the administration maintain its electoral advantages.[86] In terms of directly controlling the ECK, the Moi administration directly appointed commissioners to the Commission, including its first chairman, the retired Court of Appeal judge Justice Zacchaeus Chesoni. This resulted in a Commission populated by suspected administration loyalists. Lacking the requisite trust across the political divide, the ECK then presided over a number of irregularities, among them printing of excessive ballot papers which easily facilitated the inflation of votes.[87] In respect to deploying key state institutions in its favour, this was especially manifested in the judiciary where the cosy relationship which the administration enjoyed with sections within the judiciary had the judiciary use flimsy technicalities to dismiss opposition petitions against the administration's electoral victories.[88]

In respect to plundering state resources for campaigns, the Moi administration spent up to a total Kshs. 2 billion on the campaign, with the money coming from the Central Bank of Kenya, state parastatals and borrowing from private banks. Besides the money, the administration also used public land, state contracts and development schemes to lure voters

[85] Mpaka, 'People', 4.
[86] Odinga and Elderkin, *Raila*, 207–218.
[87] Chitere (et al), 'Documents', 30.
[88] J. Kamau, 'The History of Mistrusting Opinion Polls', *Daily Nation*, 29 July 2017, 31; K. Ngotho, 'Chesoni: The only Poll Agency Boss who Left Seat Smiling', *Sunday Nation*, 26 November 2017, 32; J. Kamau, 'How KPCU became the Abode of Thieves, Charlatans', *Daily Nation*, 27 July 2019, 31; T. Rajula, 'How Multi-party Politics Changed Kenya's Economy', *Daily Nation*, 14 February 2020, 9.

into supporting it. It encouraged the formation of a new outfit, the Youth for KANU '92 (YK92), through which the administration not only mobilised young voters to its side, but also countered the opposition wave through bribing both opposition leaders and supporters as well as instigating violence and disrupting opposition campaigns.

The second action which the administration adopted in the wake of challenges posed by the new multiparty politics was subjecting the opposition to hostile and violent treatment. This involved physically confining opposition candidates to areas where they were perceived as strong and denying them the opportunity to campaign in areas of the country which the administration designated as zones belonging to the ruling party KANU. It also involved physical violence against perceived opposition supporters. This was witnessed especially in Rift Valley Province where administration loyalists were involved in directly intimidating the opposition from campaigning in the region, while perceived opposition supporters were displaced by militias with the apparent complicity of the state.[89] Elsewhere in the country, administration loyalists ran outfits such as Jeshi la Mzee, which terrorised opposition loyalists in places such as Nairobi.[90]

The third action which the administration adopted to deal with the challenges of multi-party politics involved gerrymandering electoral boundaries to facilitate the rise of ethnic majorities in certain constituencies.[91] This was exhibited in at least one constituency in Nakuru District, where the administration reportedly settled people in the Mau forest as a means of creating a voting majority which would vote for the ruling party candidate in a perceived opposition stronghold.[92]

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[89] Morton, *Moi*, 246–258; International Commission of Jurists (Kenya Section), *The Political Economy of Ethnic Clashes in Kenya*, (Nairobi: International Commission of Jurists [Kenya Section] 2000), 8; S. Snow, 'Unhindered by the rule of law: Ethnic Terrorism and the 2007 Kenyan Presidential Election', *South African Journal of International Affairs* 16, no. 1 (2009): 8–10; Joshi (et al), *Police*, p. 15; A. Ndegwa, 'A closer look at Wachira, the police chief who blew the lid on 1990s tribal clashes', *Daily Nation*, 22 October 2020, 11; Odinga and Elderkin, *Raila*, 191; Awori, *Tiger*, 198; Karume and Gethoi, *Gold*, 268–271.

[90] Mwangola, 'Youth', 147–149; 'Kanu men', *Sunday Nation*; K. Ngotho, 'How instigators created rift of fear in Rift Valley', 7 April 2019, 31; Oruko, '"Kaa ngumu"'.

[91] Odinga and Elderkin, *Raila*, 205–206; Awori, *Tiger*, 194–196; Enock Shikolia, 'Sons of Fortune: The story of YK'92', *NTV Kenya*, 18 August 2016 https://www.youtube.com/watch?v=wEYIauUq6tc; 'Democratisation and the Rule of Law in Kenya', *ICJ Mission Report*, (Geneva: International Commission of Jurists, 1997), 16-22.

[92] K. Ngotho, 'Ruto shouldn't bite "Deep State" hand that fed him', *Daily Nation*, 22 August 2020, 33; Rajula, 'Multi-party'; J. Sigei, 'How Moi played role in plunder of Greater Mau forest', *Daily Nation*, 25 September 2019, 29; J. Sigei, 'Moi: Conservationist who ruined Mau', *Daily Nation*, 5 February 2020, 13; K. Some, 'How young operatives saved Moi's presidency', *Sunday Nation*, 29 May 2016, 32; E. Matara and F. Mureithi, 'Why Moi's Kabarak home remained his fortress', *Daily Nation*, 17 February 2020, 3.

Further reform of the electoral management system took place prior to the penultimate election under the Moi administration in December 1997. This was as a result of continuing pressure from the political opposition, vertical accountability actors and external forces. The reform aimed at reducing the influence which the Moi administration enjoyed over the electoral system. Pushed mainly through a parliamentary initiative known as the Inter-Parliamentary Parties Group (IPPG), the initiative involved negotiations among political parties represented in parliament.[93] It resulted into an agreement in which although the ruling party still appointed a majority of the commissioners into the ECK, the opposition got an opportunity to nominate some members to the 21-member commission. It also increased the number of commissioners to 21 and led to repeal of laws such as the Public Order Act, the Preservation of Public Security Act, the Chief's Authority Act, the Kenya Broadcasting Act, the Local Government Act and the Societies Act, as well as the Penal Code. These laws had been set up during the one-party era and had been adjudged inconsistent with the country's multiparty politics after the 1992 elections.[94] The IPPG arrangement presided over both the penultimate and the ultimate elections under the Moi administration. It gradually lessened the influence which the administration had enjoyed over the electoral management system. This was such that by 2002, the administration's preferred candidate in the presidential election of that year lost to the opposition's joint candidate, although fears still remained that the administration could reject the results.[95]

Parliament

The third institution which changed under the Moi administration due to pressure for good governance pressure was parliament. Perhaps more than any other institution, parliament was most directly impacted by the political reforms of the early 1990s. It not only officially recognised the political opposition but also directly accommodated it for the first time since the banning of the KPU in 1969. Although the ruling party KANU still retained dominance within the House, the party had to contend with an opposition minority that had a significant number of lawyers who had campaigned for reinstatement of the rule of law and took charge of important parliamentary roles through which it could check the Moi administration.[96] One

[93] Mwangi, *Constitution-Making*, 29–30.
[94] Chitere (et al), 'Documents', 3; Awori, *Tiger*, 203–204; Morton, *Moi*, 284; Odinga and Elderkin, *Raila*, 283; Nasong'o, 'Rules', 44.
[95] Awori, *Tiger*, 208–256; Kamau, 'Chebukati'; Osanjo, 'Hardliners'.
[96] Kibwana, Wanjala and Owiti, *Corruption,* 61; K. Kimondo, 'Why Party Wrangles are Disappointing', in *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, ed. Kivutha Kibwana, Chris Maina

such important parliamentary role was leader of official opposition. In the immediate aftermath of the 1992 elections, the Ford Asili party leader, Kenneth Matiba served as the leader of the official opposition. However, the party lost this position due to defections instigated by KANU, especially in Western Province. It was replaced by Ford Kenya, whose chairman Jaramogi Oginga Odinga (and later Kijana Wamalwa) became the leader of official opposition.[97]

Through the role of the leader of official opposition, the opposition parliamentary minority was able to exert pressure on government behaviour, especially through re-energising neglected accountability processes such as making public the annual Auditor-General's reports which previous parliaments had neglected. It also exposed cases of mega corruption in the Moi administration such as the Goldenberg Scandal.[98] In addition, individual parliamentarians such as one-time LSK chairman and Kikuyu MP Paul Muite undertook initiatives to boost the country's rule of law. One such initiative took place in April 1993 when Muite moved a motion to abolish detention without trial.[99] Related to this, the opposition parliamentarians also embarked on the reform of the security sector, working to reduce the influence of the Special Branch in the country's politics. The institution had been extensively used in the crackdown on suspected political dissidents in the single party era of the Moi administration. With the opposition's influence, parliament renamed it the National Security Intelligence Service (NSIS), laying a foundation for its later professionalisation as the National Intelligence Service (NIS).[100]

The parliamentary opposition also spearheaded the formation of the Centre for Governance and Development (CGD) where human rights activist Maina Kiai served as second chairman and good governance campaigners Davinder Lamba and Reverend Timothy Njoya served as board members. The CGD worked to educate parliamentarians as a way of transforming parliament from a one-party mindset to a multi-party mindset. One of the outcomes of the CGD's work on parliament was the formation of the Parliamentary Service Commission as parliament's administrative wing.[101] These changes led to improvement in parliamentary

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Peter and Joseph Oloka-Onyango (Nairobi: Claripress Ltd, 1996), 248–250; Odinga and Elderkin, *Raila*, 231-236; Kiraitu Murungi, Oral Interview, 18/07/2002; Morton, *Moi*, 260.

[97] Awori, *Tiger*, 199–200.

[98] Gathii, 'Anti-Corruption Agenda', *Development Review*,10–14; Nyachae, *Corridors*, 113–115; Morton, *Moi*, 264–265.

[99] Owiti and Mbaya, 'Order', 63.

[100] Wachira, 'Boinett'.

[101] Kiraitu Murungi, Oral Interview, 18/07/2002.

oversight. This was so much so that after the subsequent election of 1997, the resulting 1997-2002 parliament stood out in oversight on government, largely attributed to the leadership of Mwai Kibaki as the official leader of opposition.[102]

It should be noted, however, that the Moi administration actively worked to reduce the effectiveness of the re-energised parliament in holding the administration to account. It not only deployed its majority to defeat motions such as the one against detention without trial pushed by opposition parliamentarians, but also co-opted some members of the opposition by instigating defections to KANU.[103] Besides, the administration infiltrated important committees chaired by the opposition through working with certain leaders within those committees to kill important processes of accountability. This was reportedly the case in 1994 when the leader of the opposition Kijana Wamalwa who also doubled up as the chairman of the Parliamentary Accounts Committee (PAC) sided with KANU to regularise payments associated with the Goldenberg Scandal.[104]

The Political Opposition

The political opposition, just like parliament, received a significant boom due to the change in law which reinstated political pluralism. Apart from re-entering parliament for the first time since 1969 and using it as a platform to exert pressure on the Moi administration, the opposition was able to also mobilise outside parliament through various mass movements. One such movement was the Mwangaza Trust linked to opposition politicians Mukhisa Kituyi, Kiraitu Murungi, Anyang Nyong'o, Paul Muite, Robert Shaw and Kivutha Kibwana. The movement was also allied to influential CSOs which brought it donor support. Its purpose was to counter the influence of YK'92 on the country's politics.[105]

The Moi administration responded to the re-energised opposition through a cocktail of tactics. With changes in law to formally allow the political opposition, the administration largely abandoned the earlier tactics of detention without trial and exiling of political opponents.[106] Nonetheless, it still infiltrated the opposition, negatively branded it,

[102] Awori, *Tiger*, 205.
[103] K. Kimondo, 'Of Party Defections and the Law', in *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, 251; Awori, *Tiger*, 198–200; 'Rule of Law', *ICJ Mission Report*, 22.
[104] Gathii, 'Anti-Corruption Agenda', *Development Review*, 7–14.
[105] K. Ngotho, 'The week President Moi went underground sparking off panic', *Sunday Nation*, July 1, 2018, 29.
[106] Owiti and Mbaya, 'Order', 56; 'Charles Rubia', *Sunday Nation*; W. Menya, 'The day meek fisherman met with statesman Raila Odinga', *Sunday Nation*, 30 August 2020, 5; Muyanga, 'Balala'.

manipulated elections to reduce opposition electoral victories and deployed state institutions against it.[107] Infiltration of the political opposition was witnessed in the immediate aftermath of the re-introduction of political pluralism in 1991. Having acceded to demands by the political pressure group FORD for political pluralism, the Moi administration embarked on a mission to break up the group. It invited one of the leaders of the group to a meeting with the President, subsequently splitting FORD into at least two main factions: FORD Kenya and FORD Asili. The Moi administration also bribed some leading opposition figures and kept them in the opposition as government spies.[108]

On the other hand, negative branding of the opposition was witnessed against movements such as Saba Saba, Mwangaza Trust and Safina. Against Saba Saba, the administration claimed that the leaders of the group were hooligans and thugs out to impose tribalism in the country. As for Mwangaza Trust, the administration claimed that the outfit was part of the FEM, which the administration claimed was a rebel group led by an alleged communist militant called Brigadier John Okello, and supported by the Nation Media Group, LSK chairman Paul Muite and Anglican cleric David Gitari.[109] The deployment of the state machinery to deal with opponents was carried out mostly through the actions of the AG's office and particularly the Deputy Director of Public Prosecution. Through the AG, the administration regularly arrested opposition politicians and slapped them with charges of treason and sedition.[110] It also extended the use of riot police to violently disperse rallies and public events organised by the political opposition.[111]

A major new tactic which the administration adopted to deal with the new multi-party dispensation involved explicitly withholding statutory development to areas where the political opposition enjoyed popular support. This was exhibited, for instance, in 1996, when the Moi administration withdrew from hosting the Africa Cup of Nations tournament due to the advantage this would confer on the political opposition. The administration was anxious that hosting the tournament and staging its matches in opposition strongholds such as

[107] 'How opposition disunity handed Kanu 10 more years of rule', *Sunday Nation*, 28 February 2021, 11.
[108] Odinga and Elderkin, *Raila*, 166; Some, 'Operatives'; Shikolia, 'Sons'; Matara and Mureithi, 'Kabarak'; E. Omari, '"Ugali" incident that cast Shikuku as a traitor', *Daily Nation*, 25 August 2012, 11; K. Ngotho, 'Panic'.
[109] 'Rule of Law in Kenya', *ICJ Mission Report*, 64–65; K. Ngotho, 'Panic'; Kamau, 'Kalonzo'; Mirugi Kariuki, Oral interview, 12/08/2002.
[110] Morton, *Moi*, 275.
[111] Gisesa, 'Saba Saba'; Maichuhie, 'Maathai'.

Nairobi, Mombasa and Kisumu would help consolidate the opposition's support. To avoid such eventuality, it gave up the hosting rights for the tournament.[112]

The Anti-Corruption Institutions

There is one set of the rule of law institutions which witnessed significant growth under the Moi administration. These were centred on fighting corruption. The growth in these institutions was especially heightened after the re-introduction of political pluralism under the general framework of the good governance agenda in 1990. The change provided external donor agencies and the political opposition with a platform through which they increased pressure on the administration to fight corruption.

Prior to the re-introduction of political pluralism, the administration controlled corruption through the 1966 Prevention of Corruption Act, codes of regulations for public servants, Chapter 185 of the Public Service Commission Act, Chapter 63 of the Penal Code, Chapter 66 of the Election Offences Act, Chapter 412 of the Exchequer and Audit Act, the parliamentary Public Accounts Committee and the Public Investment Committee, the Inspector of State Corporations, the Monitoring Unit, the Public Anti-Corruption Unit and the judiciary. However, these institutions were dogged by at least three factors which made them unable to stop corruption in the country.

The first factor was that the institutions were outdated, having been inherited from the Jomo era without modifications to update them in line with the new realities of corruption in the Moi era. For instance, the institutions needed to be updated to incorporate a national code of ethics and an anti-corruption authority. However, this did not happen. Secondly, the institutions were not very well publicized across the country. They therefore could not deter public servants from engaging in corruption because the servants did not know about their existence. Thirdly, the institutions were plagued by lack of support from the top echelons of government. As a result, they operated in a selective way and lacked serious supervision and incentives for optimum performance.[113]

The Goldenberg Scandal of 1993 forced a radical change to the country's anti-corruption efforts. In the immediate aftermath of the scandal, the Moi administration set up a special

[112] D. Kwalimwa, 'Kenya's failure to host 1996 Afcon blot in Moi's rich sporting legacy', *Daily Nation*, 7 February 2020, 15.
[113] Odhiambo-Mbai, *Accountability*, 135.

anti-corruption squad within the Kenya Police Force in November 1993 following pressure from the opposition and donor agencies such as the IMF. The unit was to be headed by a Deputy Director of Police. To boost the squad's efforts against corruption, parliament amended the 1966 Prevention of Corruption Act to provide for stiffer penalties for those convicted of corruption.[114]

Due to the slow process of prosecuting suspected perpetrators of the Goldenberg Scandal, the IMF re-introduced sanctions against the Moi administration by suspending funding to the country in July 1997. In response to the renewed pressure, the administration disbanded the special police anti-corruption squad and had parliament amend again the Prevention of Corruption Act originally enacted in 1966 to create the Kenya Anti-Corruption Authority (KACA) in December 1997. The KACA was set up as a specially built anti-corruption agency, independent from the AG's direction.[115] In 1998, parliament carried out further changes to the KACA law by introducing provisions which guided the recruitment of the institution's personnel. Under the changes, the President was expected to consult CSOs and statutory bodies such as the LSK in appointing the director and assistant directors of the KACA.

The first KACA director was Harun Mwau, who pledged to fight corruption by taking on 'sacred cows.' His initial targets for investigations included the Nairobi City Council, the AG's office and the Kenya Revenue Authority (KRA). This put the KACA into direct conflict with the Ministry of Finance under Simeon Nyachae and the AG's office under Amos Wako. The AG responded to the KACA's investigations by entering a nolle prosequi on all the cases that the KACA investigated. This led to the collapse of the investigations.[116] To end the escalating turf wars between the AG and the KACA, on 30 July 1998, the Moi administration announced the suspension of KACA director Harun Mwau and appointed a tribunal to investigate his conduct. Although Mwau vigorously challenged his suspension, the tribunal went ahead to investigate him. It found him incompetent in holding the directorship

[114] Gathii, 'Anti-Corruption Agenda', *Development Review,* 10–14; M. Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability', *Indiana Journal of Global Legal Studies*, Vol 18, Issue 1, 2011, pp. 360–364.
[115] Gathii, 'Anti-Corruption Agenda', *Development Review,* 10–14.
[116] Ibid.

of KACA, citing his lack of legal and prosecutorial knowledge. With the tribunal's verdict, all the cases which the KACA had investigated under Mwau were terminated.[117]

The Moi administration appointed Justice Aaron Ringera to replace Harun Mwau as director of the KACA. Ringera's tenure was cut short by a high court ruling in the year 2000 which declared the KACA an unconstitutional body. The court justified the declaration by arguing that in picking Justice Ringera directly from the judiciary and appointing him to the KACA director's post, the administration had violated the principle of separation of power.[118] After the disbandment of the KACA, the government set up another police unit for fighting corruption, the Anti-Corruption Police Unit (ACPU), which largely failed to do any substantive work against corruption.[119]

Meanwhile, the opposition in parliament undertook two main initiatives aimed at escalating pressure on the administration to deal with corruption. The first initiative involved parliament's own investigations of government corruption through a committee chaired by Ford-Kenya's Musikari Kombo. However, the committee's report, so-called the Kombo report, was adopted by parliament in an environment lacking consensus.[120] Secondly, parliament tried to strengthen the legal provisions on the KACA to insulate the institution from the weaknesses that had led to its disbandment by the High Court in 2000. This was through the Constitution of Kenya (Amendment) Act, 2001. The effort coincided with Moi administration's own efforts to set up another anti-corruption agency to replace the disbanded KACA. This was through the Corruption Control Bill which sought to establish the Kenya Corruption Control Authority (KCCA) as the successor to the disbanded KACA. Although the bill was passed in 2001, it was not enacted into law until after the end to the Moi administration in December 2002. Hence the Moi administration exited power without any substantive efforts in punishing and preventing corruption.[121]

Without effective anti-corruption efforts, the Moi administration became embroiled in major acts of corruption, besides other acts of impunity. Corruption itself targeted state projects and

[117] Ibid.
[118] J. T. Gathii, 'Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya', *Connecticut Journal of International Law* 14, No. 407 (1999), 427–434; Gathii, 'Anti-Corruption Agenda', *Development Review,* 14–32; Kibwana, Wanjala and Owiti, *Corruption,* 60; G. R. Murunga, 'Governance and the Politics of Structural Adjustment in Kenya', in *Kenya: The Struggle for Democracy*, 288–290.
[119] Gathii, 'Anti-Corruption Agenda', *Development Review,* 14–32.
[120] Ibid.
[121] Ibid.

corporations, public land and the state's regulatory power. It also extended to the private sector, which top functionaries in the administration either raided for resources, intentionally suppressed for political reasons or tolerated only when there was personal gain to be made.[122]

Judiciary

The judiciary remained the only rule of law institution which did not undergo any significant change with the return to political pluralism in Kenya. The institution remained subservient to the executive.[123] A prominent instance which demonstrated this continued subservience was the unilateral appointment by President Moi of the ECK chairman and retired Court of Appeal Judge Zaccheus Chesoni as the new Chief Justice shortly after the 1992 elections. The appointment led to consternation in both the existing Bench and the LSK, with the two

[122] K. Ngotho, 'Harambee! From rallying cry for divided nation to political vanity', *Sunday Nation,* 14 October 2018, 32; K. Ngotho, 'Turkwel dam: Moi-era project that parallels Arror, Kimwarer', *Daily Nation,* 1 March 2019, 31; J. Kamau, 'Biwott used State House links to create business empire', *Daily Nation,* 12 July 2017, 31; K. Chesang, 'How Nicholas Biwott helped Moi to end Kenyatta elite's grip on power', *Daily Nation,* 18 July 2017, 11; C. Njung'e, 'No end in sight to resolving Kanyotu estate dispute'. *Daily Nation,* 28 October 2019, 3; J. Kariuki, 'Hosea Kiplagat: Debt haunts mobiliser who had Moi's ear', *Business Daily,* 7 August 2020, 11; S. Kiplagat, 'State money paid to Kulei for services not rendered', *Daily Nation,* 10 January 2019, 11; S. Kiplagat, 'EACC in court battle with Moi-Biwott firm over land', *Daily Nation,* 26 November 2018, 6; V. Juma, 'How Moi firm sold Uchumi fake Sh2.3bn property', *Business Daily,* 1 September 2020, 6; J. Kamau, 'How Hosea Kiplagat's fly-by-night firm took Sh292m from NSSF', *Daily Nation,* 10 August 2020, 11; J. Kamau, 'Demolitions uncover colourful life of reclusive billionaire Mike Maina', *Sunday Nation,* 23 December 2018, 31; P. Kairu, 'Politicians own huge chunks of Ngong Forest', *Daily Nation,* 28 June 2020, 8; Sigei, 'Mau'; J. Wangui, 'NSSF loses Sh293m in shady land deal done 24 years ago', *Daily Nation,* 4 January 2020, 7; Kibwana, Wanjala and Owiti, *Corruption,* 37–104; K. Ngotho, 'Turkwel Dam: Biwott project and thirst for development', *Sunday Nation,* 29 March 2020, 29; J. Kamau, 'Kemron: the HIV/Aids cure that never was', *Sunday Nation,* 26 April 2020, 32; B. Wasuna and V. Achuka, 'Just what did Moi own? Lots of questions, few answers', *Daily Nation,* 1 August 2020, 12; J. Kamau, 'How Moi commandeered KQ and flew it into financial turbulence', *Sunday Nation,* 10 February 2019, 31; J. Kamau, 'How National Bank was brought to its deathbed', *Daily Nation,* 14 September 2019, 11; J. Kamau, 'How Nyayo taxi scandal came about', *Sunday Nation,* 10 March 2019, 31; N. Gisesa, 'When genocide fugitive Kabuga ran businesses in Kenya', *Daily Nation,* 18 May 2020, 11; Nyachae, *Corridors,* 102–106; Morton, *Moi,* 206–207; J. Kisero, 'Under Moi, economy survived collapse only by divine grace', *Daily Nation,* 4 February 2020, 11; G. Wachira, 'When Jaramogi visited me without an appointment', *Business Daily,* 8 October 2019, 4; Cockar, *Doings,* 221–234; Africa Centre for Open Governance, *Poisoned Legacy: Assessing Amos Wako's Performance* (Nairobi: Africa Centre for Open Governance, 2011), pp. 1–15; K. Ngotho, 'Power jigsaw: How an invisible government operated in Moi era', *Sunday Nation,* 3 September 2017, 31; S. Owino, 'Former principal recalls Daniel Moi's compassion', *Daily Nation,* 7 February 2020, 16; 'Paul Joseph Ngei', *Kenya Yearbook 2010,* Kenya Editorial Board; D. Musila, 'Dire effects of clash with Ukambani "King" Mulu Mutisya', *Daily Nation,* 27 March 2019, 11; 'Moi's Cabinets and unending intrigues', *Daily Nation,* 12 February 2020, 22; W. Menya, 'Wako: Is the lucky "angel" headed for a fall?' *Sunday Nation,* 24 November 2019, 24; K. Kanyinga, 'Why the economy performed dismally under Moi', *Sunday Nation,* 16 February 2020, 13; 'Daniel arap Moi: How Kenyans learnt to laugh at the president', *BBC News,* 11 February 2020, https://www.bbc.com/news/world-africa-51443619 (accessed 10 March 2020); N. Gisesa, 'For most security honchos, power is their second nature', *Sunday Nation,* 5 May 2019, 27.

[123] 'Democratisation and the Rule of Law in Kenya', *ICJ Mission Report,* (Geneva: International Commission of Jurists, 1997), 23; Kiraitu Murungi, Oral Interview, 18/07/2002.

institutions questioning the appointment on account of the appointee's earlier controversial departure from the judiciary.[124]

Furthermore, the judiciary continued making rulings which favoured the Moi administration as had been the habit prior to the re-introduction of political plurality. One such favourable ruling involved a presidential petition case filed by the 1992 FORD Asili presidential candidate Kenneth Matiba against the declaration of Daniel arap Moi as winner of that year's election. Presiding over the case, Court of Appeal judges Majid Cockar, Riaga Omolo and Mathew Guy Muli dismissed the petition on a technicality, thus upholding Moi's electoral victory.[125]

In addition, the Moi administration displayed its continued dominance over the judiciary as late as 1997 when it issued a directive which prohibited the judiciary from involvement in land, political parties and university affairs.[126] Although some minor internal reform was attempted when Chief Justice Chesoni appointed a committee chaired by Justice Richard Kwach in January 1998 to investigate judicial corruption and make recommendations for reforms, nothing came of the recommendations. The judiciary only moved towards significant reform after the Moi era came to an end in December 2002.[127]

It can thus be concluded that the Moi administration inherited a legacy in which the principles of rule of law were not respected. All rule of law institutions which were expected to enforce the principles were in a state of decay after their encounter with the Jomo administration. The Moi administration escalated the decay by repurposing the institutions to consolidate its power. For instance, to the practice of detention without trial inherited from the Jomo Kenyatta administration, the Moi administration added the element of torture.

The return to political pluralism via the good governance agenda of the early 1990s helped to revive some of the rule of law institutions that had been entirely emasculated under the one-party rule. Three of the institutions that were revived under the agenda included parliament, the opposition and the electoral commission. The agenda also mobilised attention towards official corruption and ignited the establishment of the early institutions for combating the vice. However, even with the good governance agenda, other institutions such as the judiciary

[124] Kegoro, Interview.
[125] Cockar, *Doings*, 201–204; Morton, *Moi*, 22.
[126] Adar and Munyae, 'Abuse', *African Studies Quarterly*, 12.
[127] Odhiambo-Mbai, *Accountability*, 135–136; Kamau, 'Citadel'.

remained subservient to the executive until the Moi administration's tenure came to an end in December 2002.

In undermining the rule of law, the Moi administration exercised power without any effective formal restraints. Vast, unchecked powers made the administration commit numerous excesses. The excesses drew the attention of sections of the wider society, which attempted to restrain the administration from them. Although the groups may not have deployed the rule of law in their quest to restrain the Moi administration from excesses, they nonetheless exercised a form of restraint on the administration emanating from outside the state's formal restraints called vertical accountability. The following section establishes how this took place.

4.3 Moi Administration and Vertical Accountability

At the time of the Moi administration's ascendancy to power, most vertical accountability institutions had been largely silenced by the preceding Jomo administration. Of the three institutions which the Jomo administration had inherited from the colonial era, namely, the church, the labour movement and the media, it was perhaps only the church which still retained some capacity to restrain the state from excesses. On the one hand, the media had been silenced through direct threats, deportation of the *Daily Nation*'s Ghanaian sub-editor John Dumoga and lawsuits during the Jomo administration. On the other hand, the labour movement had been placed under the direct control of KANU. Only the church had survived the Jomo administration's onslaught against institutions demanding for checks and balances. Even the church remained frail, with sections of it being implicated in the excesses of the administration, and hence lacking the moral authority to restrain the administration from excesses.

The Moi administration exploited the frailties of the existing vertical accountability actors by maintaining a hostile environment which negated their revival. However, unlike the Jomo Kenyatta administration, the Moi administration had to contend with not just an increase in the number of vertical accountability actors, but also the revival of some of the original vertical accountability actors which the Jomo administration had neutralised. For instance, the media witnessed a resurgence during the Moi era. New actors such as the LSK also emerged during the era. With these developments within the vertical accountability terrain,

the Moi administration had to respond, and did so by injecting within the terrain its own signature agency and ensuring that none of the actors was able to restrain it from excesses.

Faith-based Entities under the Moi Administration

The church had provided significant restraint against the Jomo administration. Sections of it had successfully stopped the administration from excesses, most notably the oathing ceremonies of 1969 in the aftermath of Mboya's assassination. The church hence remained a potentially strong source of restraint against the Moi administration. This was even more likely, given that the personalities who had been holding the Jomo administration to account were still active and opposed to the continuity between the two administrations represented by functionaries such as AG Charles Njonjo who served the two administrations. Prominent among these personalities were CPK clerics Henry Okullu and David Gitari.[128]

It should be noted, however, that under the Moi administration, two significant developments were witnessed within the clerical fraternity. First, criticism of the administration was collectively organised under the general banner of the NCCK, instead of around a few individual clergymen as had been the case under Jomo Kenyatta. Secondly, the personalities who had been critical of the Jomo administration were joined by new personalities from a diversity of denominations and faiths in criticising the Moi administration. For instance, the two early church-affiliated critics of the administration, Okullu and Gitari, were joined by their fellow CPK clergyman Alexander Muge in condemning government excesses.[129] Working within the NCCK, other denominations also saw the emergence of prominent government critics within their midst. These included Mutava Musyimi from the Baptist Church, Timothy Njoya from the Presbyterian Church of Eastern Africa (PCEA) as well as Ndingi Mwana 'a Nzeki and Father John Kaiser, both from the Catholic Church.[130]

Outside the church, there also rose clerics from other faiths. From amongst indigenous faiths, a prominent practitioner was Konya wa Gakonya of the Tent of the Living God. From the

[128] Ng'weno, 'Njonjo', *Makers of a Nation* series.
[129] B. K. Chacha, 'Pastors or Bastards? The Dynamics of Religion and Politics in the 2007 General Elections in Kenya', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections,* ed. Karuti Kanyinga and Duncan Okello (Nairobi: Institute for Development Studies, 2010), 108–111; Gitari, *Troubled*, 189.
[130] Gitari, *Troubled*, 92–97; G. Sabar-Friedman, 'Church and State in Kenya, 1986–1992: The churches' involvement in the "game of change"', *African Affairs* 96, No. 382 (1997), 14–26; Odinga and Elderkin, *Raila*, 144; S. J. Muoki and S. A. Kapinde, '"Pulpit power" and the unrelenting voice of Archbishop David Gitari in the democratisation of Kenya, 1986–1991', in *Historia 61*, No. 2 (2016): 79–100; 'Hon. Paul Muite', *Mentorship Web Series*.

Muslim faith, there were at least two clerics who were critical of government excesses: Sheikh Mohamed Khalifa and Khalid Salim Ahmed aka Sheikh Balala. The relationship between the Moi administration and the Muslim fraternity had similarities with that between the administration and the Christian fraternity. It had both co-optation and suppression. On the one hand, the administration, like that of Jomo Kenyatta before it, maintained a somewhat ambiguous attitude towards the Muslim community. On the other hand, the SUPKEM remained the main structure through which Muslims engaged with the administration. The organisation, speaking on behalf of Muslims, had been among the first organisations to endorse Moi's ascension to power in late 1978. As a government-aligned organisation, SUPKEM remained the main means through which the administration co-opted Muslim support for its policies. As such, SUPKEM only offered innocuous critique of government on cultural issues such as the law of succession.[131]

There was a shift, however, in the relationship between Muslims and the administration as years went by. For instance, after the 1982 coup attempt, the administration became increasingly warm towards a section of the Muslim and Somali elite because of the role the elite had played in suppressing the coup. But even as the administration was warming towards a section of Muslims, other Muslim personalities and groups, more critical than the SUPKEM and operating outside its remit, began emerging. In 1989 for instance, Muslims in Mombasa protested the government's move to permit Reinhard Bonke to preach in Mombasa while barring Muslim preachers from Tanzania from doing the same. Those in northern Kenya criticised discrimination in issuing identification to Muslim-majority communities, especially the extra screening placed on the Somali community (ostensibly to prevent refugees from Somalia from becoming Kenyans).[132] The re-introduction of political pluralism prompted Muslim groups at the Coast to form the Islamic Party of Kenya (IPK) in January 1992 with the intention of contesting that year's election. The party's main objective was to champion Muslim rights. Alongside the party also emerged influential Muslim personalities, among them the anti-KANU cleric Sheikh Balala.[133]

[131] Ndzovu, *Muslims,* 72–74.
[132] Ibid, 76.
[133] Ibid, 10.

Collectively, the clergy from different faiths and denominations was able to confront the Moi administration at different stages of its existence over excesses.[134] The first incidence which brought the clergy in confrontation with the administration was in 1983, when a church in Kiambu attempted to offer succour to troubled Minister Charles Njonjo.[135] This was followed later by several other confrontations between the administration and the church, including the 1987 confrontation over the introduction of the queue voting system; the 1990 confrontation over the administration's handling of multi-party crusaders where some clergymen such as Henry Okullu and Zacchaeus Okoth provided sanctuary to multi-party advocates hounded by the administration; the 1993 and 1998 confrontations over the administration's hand in the ethnic clashes in parts of the Rift Valley and the Coast after the 1992 and 1997 general elections; and the clashes with the clergy over the constitution review process which began in earnest from 1998.[136]

In the 1987 confrontation over queue voting, prominent clergymen who opposed the new electoral system were Alexander Muge and Manasses Kuria.[137] Following the ethnic clashes of the 1990s, the Catholic Church employed pastoral letters addressed to the President, with one such letter being in the immediate aftermath of the ethnic clashes in 1992. Following the letter, Catholic Bishop Ndingi Mwana'a Nzeki became more vocal in denouncing the clashes.[138]

Soon after the 1997 election in which the Moi administration extended its rule, faith-based groups coalesced around the Ufungamano Initiative as a parallel to the government-led CKRC in demanding for a new constitution for Kenya.[139] In the wake of the confrontations, the administration's response to the clergymen consisted of at least four tactics. These included deployment of state institutions, particularly parliament to silence the clergymen, negatively branding them, outright violence against the clergymen, deportation of some

[134] Gecaga, 'Profane', 82–84; T. Osanjo, 'Pious side of Moi and church fundraisers', *Daily Nation,* 10 February 2020, 9; Kibwana, 'Ndingi'; Muyanga, 'Balala'; Muyanga, 'Row'; S. Kazungu, 'Muslim'.
[135] Wainaina, 'Githegi'.
[136] Odera, *Confidant,* 167; Odinga and Elderkin, *Raila,* 174; Gitari, *Troubled*, 262; Kibwana, 'Ndingi'; F. Muroki, 'Ndingi: Small-framed prelate who stood tall, giant above all others', *Daily Nation,* 6 April 2020, 13; M. Mutua, 'RIP Archbishop Ndingi Mwana a'Nzeki, a sage for the ages', *Sunday Nation,* 7 June 2020, 11.
[137] Morton, *Moi*, 219; Gitari, *Troubled*, 235–239.
[138] C. Mulei, 'Power: In Whose Interest?' in *In Search of Freedom and Prosperity: Constitutional Reform in East Africa,* 207.
[139] J. M. Mati, 'Social Movements and Socio-Political Change in Africa: The Ufungamano Initiative and Kenyan Constitutional Reform Struggles, 1999–2005', *Voluntas*, No. 23 (2012) 63–84; Gitari, *Troubled*, 259–262; Nasong'o, 'Rules', 39.

clergymen and co-optation of sections of the clergy through offering favours and cultivation of cosy personal relations with them to silence them from condemning the administration.

Deployment of parliament to denounce the clergymen was the tactic most preferred by the administration in dealing with its faith-based critics. The tactic was applied in the case of the church elder who had prayed in solidarity with Njonjo in 1983, whereby parliament convened a special session to condemn the elder, causing him to write a personal apology to the President. The tactic was used again in denouncing the church when the institution condemned the introduction of the queue voting system prior to the 1988 election. This was so despite the fact that the administration accepted some of the demands of the clergymen by exempting the clergy, certain cadres of civil servants and other elite groups from voting by queuing and instead allowed them to vote through proxy. The same tactic was applied again in July 1990, when parliament convened a special session to condemn the church's support for a return to political plurality in the aftermath of the first Saba Saba rally on 7 July 1990.[140]

The tactic of negatively branding and denigrating clergymen behind the condemnation of the excesses of the Moi administration was witnessed in the special session of parliament summoned on 10 July 1990 to condemn the first Saba Saba rally. During the session, a government deputy minister produced a list in which the Anglican clergyman Henry Okullu was listed as one of the members of a clandestine cabinet of ministers which was said to be working to overthrow the Moi administration. In 1995, another Anglican clergyman David Gitari was accused of being a member of the FEM, which was claimed to be a rebel group committed to overthrowing the Moi government and establishing communist rule in Kenya.[141]

The Moi administration went beyond verbal admonition of the critical clergymen and meted out actual violence against at least four Christian clergymen. The first of these was Anglican clergyman David Gitari who survived a physical attack on his residence in Embu in April 1988. The matter led to protests from NCCK and its international affiliates, forcing the administration to promise to form a commission of inquiry into the matter. But this was never done.[142] The second Christian clergyman to suffer violence was Alexander Muge, who died in a mysterious car accident in August 1990 after being threatened by a cabinet minister. The

[140] 'Charles Rubia', *Sunday Nation*; 'Masinde Muliro', *Kenya Yearbook 2010,* Kenya Editorial Board; Omari, '"Ugali"'; Wainaina, 'Githegi'.
[141] Gitari, *Troubled,* 239–241; Muyanga, 'Balala'; Omari, '"Ugali"'; K. Ngotho, 'The week President Moi'.
[142] Gitari, *Troubled,* 246–248.

third clergyman to be physically assaulted was PCEA's Timothy Njoya. He was accosted on 7 July 1997 (during the so-called Saba Saba riots) just outside the parliament building in the Nairobi CBD by members of the Jeshi la Mzee militia who beat him up so severely, he required critical medical attention. The fourth clergyman to suffer physical harm was the Catholic Church's Father John Kaiser. His lifeless body was found lying beside the Nairobi-Nakuru highway on the outskirts of Naivasha town on 25 August 2000, after he raised questions with regard to the administration's handling of ethnic clashes in the Rift Valley.[143]

Besides attacking individual clergymen, the administration was also involved in at least one attack against people taking refuge in a place of worship in at least one incident. This happened on day on 7 July 1997 (the same day that Rev Njoya was beaten up by the Jeshi la Mzee militia) when police attacked groups of protestors within the All Saints Cathedral in the Nairobi CBD. The attack was greeted by widespread condemnation by religious leaders affiliated to the Anglican Church from across the world.[144]

On the other hand, the administration co-opted sections of the Christian clergy as a way of managing the critical voices emerging from faith-based groups. Co-optation took various forms, including sending cabinet ministers and senior government officials to outspoken clergymen in churches they were affiliated to. This was the case when the administration sent ministers Marsden Madoka, Albert Ekirapa, Gideon Ndambuki and Joe Nyaga, all affiliated to the Anglican Church to persuade their archbishop David Gitari to tone down criticism against the Moi administration.[145]

A second tactic at co-optation targeted even some of the most vocal critics of the Moi administration. An example here was the deployment of Anglican clergyman Alexander Muge, a fiery critic of the administration as a double agent who worked with the administration to track down the Mwakenya dissidents and inform the administration on the activities of critical Anglican Church clerics to the administration.[146] Another critical clergyman co-opted by the administration was the Anglican archbishop Manasses Kuria who sought to extend the administration's personality cult around the President by publishing and distributing a church calendar with the portraits of the President and himself. The calendar

[143] Kazungu, 'Sight'.
[144] Gitari, *Troubled*, 262.
[145] Ibid, 263–265.
[146] Ibid, 88–92.

was, however, rejected by other Anglican clergy for being an indication of an unhealthy closeness to the Moi administration.[147]

A third tactic in the co-optation of the Christian faith-based groups by the Moi administration took the form of extending special favours and cultivation of cosy personal relations with sections of the clergy. This was the case with the AIPCA. The Moi administration extended a special favour to the church by proposing to return to it schools and other institutions it had lost to mainstream churches during the colonial-era. However, this was interpreted as a political gimmick aimed at dividing the church after a majority of them had denounced the excesses of the administration, with both then opposition leader Mwai Kibaki and NCCK chairperson Mutava Musyimi opposing the move.[148] In addition, the administration cultivated warm personal relations between the President and sections of the Christian clergy. This applied mostly to a number of leading evangelical churches and at least one head of the Catholic Church in Kenya.[149] Among these churches were the Christ Is The Answer Ministries (CITAM), the Redeemed Gospel Church and the African Inland Church (AIC). The President not only frequented these churches, but also gave them resources such as land to advance their interests. Consequently, the churches did not raise questions on the problems facing the country, including government excesses.[150]

The co-optation resulted in a split in the Christian fraternity, leading to the emergence of a pro-administration faction under the Evangelical Fellowship of Kenya (EFK) banner and an anti-administration faction under the NCCK. As a result of the split, the faith-based fraternity was unable to unite in its response to the excesses of the Moi administration. For instance, a number of pro-administration churches under the EFK, among them AIC, AIPCA, Church of God, Full Gospel Churches of Kenya, Pentecostal Assemblies of God and Salvation Army withdrew from the NCCK because of the position it had taken against the 1988 queue-voting electoral system imposed on the country by the Moi administration.[151]

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[147] Ibid, 154.
[148] J. Kamau, 'Schools?'
[149] D. Mokua, 'Cardinal helped Mzee steady economy', *The Standard*, 12 February 2020, 20.
[150] Mati, 'Social Movements', 79; Osanjo, 'Pious'; K. Ngotho, 'Day President Moi stayed in church'; A. Wako, 'Why Moi never carried his trademark "Fimbo ya Nyayo" to church', *The Star*, 10 February 2020, 15.
[151] J. A. Okuku, 'Civil Society and the Democratization Processes in Kenya and Uganda: A Comparative Analysis of the Contribution of the Church and NGOs', *African Journal of Political Science* 7, No. 2 (2002): 85; Gitari, *Troubled*, 236; C. Chebet and Y. Chepkwony, 'Kabarak chapel where Moi led in discipline, true gospel', *The Standard*, 12 February 2020, 25; Ndzovu, *Muslims*, 57-59.

Among the Muslims, the Moi administration responded to the emerging Muslim agitation through measures similar to those employed to contain the Christian clergy. First, it used the SUPKEM to stave off Muslim criticism, with the organisation often emerging to counter any criticism directed at the administration by other Muslim organisations and personalities. A case in point was in 1984, when the organisation suspended its Secretary General Ahmed Khalifa for condemning the Wagalla Massacre. In 1991, SUPKEM also denounced Khalifa for his frequent criticism of government policies such as the screening of Somalis. In 1992, with the emergence of IPK, the SUPKEM distanced itself from the new party and prohibited its members such as Khalifa from associating with it.[152]

The second measure which the Moi administration took to counter growing Muslim criticism of his administration involved targeting individual Muslim personalities and subjecting them to hostile measures. Two of the personalities who faced such hostile measures were Sheikh Balala, who was declared an alien from Yemen and had his Kenyan citizenship revoked, and Mombasa cleric Sheikh Mohamed Khalifa, who was thrown into detention. Thirdly, the Moi administration refused to grant the Islamic Party of Kenya (IPK) official registration along with the Green African Party and the Kenya Nationalist People's Democratic Party. In refusing to grant the registration, the administration alleged that the IPK violated Kenyan law for being a religion-affiliated political party. The refusal to register the party was initially met with protests from IPK supporters who engaged KANU supporters in running battles. Gradually, however, the party's supporters transferred their loyalty to other parties, with those in Mombasa, Kwale, Kilifi and Tana River supporting FORD Kenya, while those in Lamu transferred their loyalty to the Democratic Party (DP).

The Moi administration also supported the setting up of a parallel organisation, the United Muslims of Africa (UMA) in 1993 to further reduce the influence of the IPK on Muslims at the Kenyan coast. The UMA was projected as a body representing the interests of indigenous African Muslims as opposed to the IPK, which was projected as an Arab Muslim Party. Led by an indigenous Muslim, Omar Masumbuko, the group then engaged in a campaign of terror and disruption against IPK activities at the Coast. To further diminish the IPK's support base, the Moi administration encouraged the registration of the *Shirikisho* Party of Kenya (SPK)

[152] Ndzovu, *Muslims*, 85.

which had been formed by another set of Muslims, the Digo Muslims. This had the effect of reducing further support for the IPK.[153]

Media under the Moi Administration

The media, just like the faith-affiliated entities, survived the Jomo-era restrictions against its role as a vertical accountability actor and emerged to restrain the Moi administration from excesses. The media's relationship with government was already fraught with tension when the Moi administration came to power. A *Daily Nation* sub-editor had already been deported to his home country and the Jomo administration had regularly summoned journalists to warn them against taking a critical editorial policy against government.

The Moi administration, just like it did with most of the other rule of law and vertical accountability institutions inherited from the Jomo administration, not only maintained the restrictions on the media inherited from its predecessor, but also added new dimensions to the restrictions. For instance, early in his administration, the new President introduced a direct telephone line with all senior editors in the country as a way of controlling what they published.[154] The new administration also introduced the habit of deploying covert officers from the country's intelligence agency to trail journalists suspected of taking a critical editorial stance against the administration.[155]

The administration's relationship with media was characterised by two main stances. The first stance involved acquiring, directly influencing and using a section of the media to advance its interests. Secondly, it suppressed the section of the media which remained independent of the administration's influence, making it unable to function effectively.[156] Under the first stance, the administration acquired a number of significant media outlets. One of these outlets was the *Nairobi Times,* which the administration acquired in a joint venture with a British businessman, Robert Maxwell. *Nairobi Times* was bought from Hillary Ng'weno in April 1983 and transformed it into *Kenya Times,* with a Kiswahili version called *Kenya Leo*.[157] Another media outlet which was acquired in similar fashion by the

[153] Ibid, 75–97.
[154] Gitonga-Wanjohi, *Ochieng*, 248.
[155] K. Ngotho, 'When editors lived in perpetual fear of Daniel Moi's phone calls', *Sunday Nation*, 15 October 2017, 23; 'Laugh', *BBC News*.
[156] K. Makokha, 'The Dynamics and Politics of Media in Kenya: The Role and Impact of Mainstream Media in the 2007 General Elections', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, 275–289; Gitonga-Wanjohi, *Ochieng*, 136.
[157] Gitonga-Wanjohi, *Ochieng*, 162.

administration was the Kenya Television Network (KTN).[158] The Moi administration also took over the public broadcaster, the Kenya Broadcasting Corporation (KBC). Although the KBC was publicly funded, the administration converted it into a partisan mouthpiece, by using it portray the administration's activities positively while painting the political opposition negatively.[159]

With the re-introduction of multi-party politics in the early 1990s, the administration invested in a number of publications. Two such publications were the *KANU Briefs* published by the *Kenya Times* and the *Weekend Mail*, both edited by Philip Ochieng. The publications were used in smear campaigns against perceived administration critics.[160]

The Moi administration also influenced the media by cultivating friendly relations with sections of the independent media and influential media personalities. At the beginning of the administration's reign, one outlet which exhibited friendly relations to the administration was Salim Lone's *Viva* magazine. The magazine gave the administration a warm welcoming coverage, calling for the new President to ascend into substantial power, rather than merely act for a short period of time. Due to the positive coverage, the new President gave an interview to the magazine.[161]

Similar positive relations early in the administration's reign were witnessed between the administration and the *Daily Nation*. During this period, the new President would often call editors at the media house to influence certain editorial positions and to comment on the pictures used in depicting him.[162] Among influential media personalities who befriended the administration, journalist Philip Ochieng was perhaps the most outstanding. He directly benefitted from these positive relations, being identified as among the beneficiaries of the proceeds from the Goldenberg Scandal which rocked the administration.[163]

In return for the positive relations, sections of the media and the influential media personalities gave the Moi administration positive coverage. In some instances, they became channels through which the administration passed false information to the public. In other

[158] J. Kamau, 'Swindler'.
[159] Kadhi and Rutten, 'Watchdogs', 244–263; K. Ngotho, 'Panic'; Nyairo, 'Music'.
[160] Gitonga-Wanjohi, *Ochieng*, 175–214; M. Ngwiri, 'No easy task for new CJ Martha Koome', *Daily Nation,* 1 May 2021, 11; Ngwiri, 'How I helped'.
[161] S. Lone, 'Jomo's death: How Moi astutely managed power transition', *Sunday Nation,* 9 February 2020, 23.
[162] Gitonga-Wanjohi, *Ochieng*, 188–191; P. Mwaura, 'Moi cared about his optics and faulted how we used his images', *Daily Nation,* 6 February 2020, 22; K. Ngotho, '"fake news"'.
[163] Gitonga-Wanjohi, *Ochieng*, 226–227.

instances, the media engaged in smear campaigns against the administration's critics and justified some of its excesses. This was the case for instance with Ochieng, who, through editing pro-administration publications such as the *Kenya Times,* the *KANU Briefs* and the *Weekend Mail*, aided the administration's 1990s' smear campaign against its critics, including clergymen and judges.[164] A similar practice had earlier been carried out by former *Daily Nation* editor George Githii who, as editor at the *Standard* in January 1980, wrote an editorial justifying detention without trial.[165] Another magazine, the *Weekly Review* took on a similar pro-administration role in the late 1980s by identifying and publishing names of academics it claimed were behind student unrest at the universities. Among those named were George Katama Mkangi, Mukaru Ng'ang'a, E. Atieno-Odhiambo, Kihumbu Thairu, Shadrack O. Guto, Willy Mutunga and Oki Ooko Ombaka.[166]

The Moi administration's second stance towards the media was suppression of sections of the media which it could not influence. There were at least three types of media which fell in this category. The first consisted of underground publications associated with dissident groups, particularly *MWAKENYA*. This included publications such as *Mpatanishi* and *Pambana.* It also consisted of publications which emerged in the era of multi-party politics and were associated with the opposition. Among these included *The People Weekly*, *The Nairobi Law Monthly*, *Finance, Beyond* and *Society*.[167]

The second type of media beyond the administration's influence consisted of mainstream media which retained an independent reporting and editorial policy. The most outstanding of this type of media was the *Daily Nation*. Due to its independent stance, the newspaper fell into frequent trouble with the administration. One such instance involved the newspaper's reportage of a 1980 industrial strike by medical workers. The workers had downed their tools to protest poor working conditions. The Moi administration issued a statement instructing them to resume work. In reporting the administration's statement, the *Daily Nation* portrayed

[164] Ibid, 175–214.
[165] Kadhi and Rutten, 'Watchdogs', 253–260; Odinga and Elderkin, *Odinga*, 94.
[166] J. Kamau, 'Torture'.
[167] S. G. Gachigua, 'Fuelling the violence: The Print Media in Kenya's volatile 2007 post-election violence', in *Kenya: The Struggle for a New Constitutional Order*, 47–49; *The Citation for Admission into the Law Society of Kenya Roll of Honour,* The Law Society of Kenya (Nairobi: The Law Society of Kenya, 2016); K. Mungai, 'Confessions'.

it as anonymous, having received it without authenticating signatures. This angered the administration, which unleashed state agents against the newspaper.[168]

The third type of media which the Moi administration did not have total influence over was the Information Communication Technology (ICT)-based media, which emerged in the late 1990s. This media had the potential to significantly disrupt the administration's monopoly over news by opening up new ways of expression and communication, which the administration feared could be used to bring it down. The administration specifically feared that ICT equipment such as computers might interfere with state secrets.[169]

The administration came up with four measures to suppress the media that it could not influence. These measures were commensurate to the publication type. For media associated with underground movements, the administration branded them seditious and banned them from public circulation. It also jailed those found with the publications, whether author, publisher, distributor or reader. Among the publications that received this treatment were *Mwakenya*, *Mwanguzi*, *Cheche Kenya* (*Independent Kenya*), *The Trial of Dedan Kimathi*, *Pambana*, *Mpatanishi*, *Kenya News*, *Kenya: A Prison Notebook*, *Kauli Raia* (*People's Opinion*) and *Kenya: Register of Resistance*, all associated with the outlawed *MWAKENYA* group. Also banned was the NCCK-affiliated publication, *Beyond*, for its criticism of the queue voting electoral system introduced in 1988.[170] A notable publication banned in a similar manner was politician Kenneth Matiba's *Kenya: Return to Reason* published in 1993, which exposed corruption in government. The ban extended to foreign publications, among them Marxist literature, including *The Communist Manifesto* and Muammar Gaddafi's *Green Book*. By 1991, when political plurality was reintroduced, at least 20 publications stood banned by the administration.[171]

The second measure which the administration introduced against critical publications was taking all the copies of the publications off the streets, either by buying or confiscating them. This was mostly carried out on foreign publications arriving at the Jomo Kenyatta International Airport (JKIA), although a number of local publications also received similar

[168] K. Ngotho, 'Drama'.
[169] B. Warigia, 'Governance, Technology and the Search for Modernity in Kenya', *William & Mary Policy Review*, 1 (2010): 87–96; Dominic Walubengo, 'Moi wasn't a darling of the Internet and ICTs', *Daily Nation*, 11 February 2020, 12.
[170] Kibwana, Wanjala and Owiti, *Corruption*, 37; M. Mathiu, 'What violence in ODM rank and file says about leadership', *Daily Nation*, 7 April 2017, 11; N. Gisesa, 'Mwakenya leaders regroup to tell their experiences', *Daily Nation*, 4 February 2020, 17.
[171] Kadhi and Rutten, 'Watchdogs', 243–244.

treatment.[172] The administration also confined media outlets and local publications it considered hostile to urban areas and restricted their circulation up-country.[173]

The third measure against critical media by the administration involved directly targeting individual journalists and either jailing or exiling them. This happened to *Viva* publisher Salim Lone, who was stripped of his Kenyan citizenship and forced into exile. Another *Viva* journalist, Wang'ondu Kariuki, was arrested, prosecuted and jailed for four and a half years in 1982 for being associated with the outlawed *Pambana* publication. A similar fate befell Pius Nyamora, publisher of *Society* magazine, who was forced into exile in the US in 1994.[174] Related to this was the use of state agencies to harass individual media outlets and personalities. This consisted of measures such as using parliament to denounce the independent media, as was the case when in 1990 and 1995, parliament denounced the Nation Media Group (NMG) as one of the dissident entities planning to overthrow the Moi government.[175] It also consisted of passing hostile laws which could be used to suppress the media. This was the case in 1992 when the administration revisited the Defamation Act and added hefty penalties for media houses accused of publishing information considered defamatory by the administration.[176] In addition, the administration used the law courts to punish and silence media personalities, as were the cases of Wang'ondu wa Kariuki, who was charged with sedition and imprisoned, and Bedan Mbugua and David Makali, editors of the NCCK-affiliated magazine, *Beyond*, who were found guilty of contempt of the Appeal Court of Kenya and jailed.[177]

The most frequently used set of state institutions in containing the independent media under the Moi administration was the security agencies, which were deployed in tracking down and torturing publishers of critical publications as was the case with the *Daily Nation* over the 1980 medical workers' strike. During the incident, security operatives went to the NMG offices and arrested several journalists, including the Editor-in-Chief, the Managing Editor, the News Editor, two reporters and the chief sub-editor and kept them in police custody. The arrested journalists were released following pressure from international human rights

[172] 'Laugh', *BBC News*.
[173] Kiraitu Murungi, Oral Interview, 18/07/2002.
[174] Gisesa, 'Mwakenya'; C. Onyango-Obbo, 'When the best are jailed or killed', *Daily Nation*, 18 March 2021, p. 11; Mirugi Kariuki, Oral interview, 12/08/2002.
[175] Gitari, *Troubled*, 265.
[176] Forole. 'Crusade', *American University International Law Review*, 71–79.
[177] Gitari, *Troubled*, 239.

organisations and only after the NMG issued a direct apology to the President.[178] A similar fate almost befell another *Daily Nation* editor George Mbugguss, who the administration sought to arrest in 1990 for having published a sermon by PCEA cleric Timothy Njoya, which called for a return to political pluralism. The editor was spared arrest after publishing a rejoinder to the sermon which provided the administration's response to Njoya's sermon.[179]

Besides arresting and jailing media personalities, the administration also issued direct threats to the media and forced it to act against journalists who had offended it. Senior officials and personalities in the administration routinely called journalists and media houses to warn them of dire consequences for the stories they carried. This was the case for the *Daily Nation* columnist Tom Mshindi, who was criticised in a rally addressed by the President, forcing the columnist to go into hiding to avoid arrest.[180] Other individual journalists whose careers were disrupted due to pressure exerted on their employers by the Moi administration included veteran editor George Githii, who had changed his mind on detention without trial, denouncing it as unlawful. For this stance, the *Standard* sacked him. He eventually left the country for exile in Canada.[181] *KTN* anchor, Rose Lukalo also lost her job for placing Mwai Kibaki's resignation from government as the leading item in the *KTN* news on the 1991 Christmas Eve.[182]

The administration reacted to the ICT-based media by largely prohibiting and restricting its spread across the country. It deployed the Kenya Post and Telecommunications Corporation (KP&TC) to tightly control the ICT sector. The Corporation placed high import tariffs on the infrastructure which the new media required to operate, such as desktop computers. It also restricted the licensing of internet services, and only allowed a few providers to supply limited internet and email services, while totally restricting internet-enabled voice and video services. Nevertheless, pressure from external bodies eventually forced the administration to gradually allow the growth of the media in the country.[183]

[178] Gitonga-Wanjohi, *Ochieng*, 196; Odinga and Elderkin, *Raila*, 99; Gisesa, 'Mwakenya'; K. Ngotho, 'Drama'; K. Ngotho, 'Calls'; Kadhi and Rutten, 'Watchdogs', 245–251.
[179] K. Ngotho, 'Calls'.
[180] K. Ngotho, 'Drama'; T. Mshindi, 'My encounters with Moi revealed his two sides', *Sunday Nation*, 9 February 2020, 31.
[181] Odinga and Elderkin, *Raila*, 94; Gitari, *Troubled*, 88.
[182] Awori, *Tiger*, 183.
[183] Warigia, 'Governance', 87–96; Walubengo, 'ICTs'.

The Labour Movement under the Moi Administration

A final vertical accountability actor which the Moi administration inherited from the Jomo era was the labour movement. However, by the time the administration came to power, the labour movement had been eviscerated by being forced into one umbrella body COTU, which had been made answerable to the ruling party KANU. The Moi administration continued with this control, ensuring that the labour movement remained unable to challenge it. To weaken the union further, the administration ordered the deregistration of the Union of Kenya Civil Servants in July 1980. The administration's control of the labour movement was so complete that in 1988, COTU Secretary General Joseph Mugalla publicly affiliated the organisation to the ruling party KANU.[184]

Due to the co-optation of COTU and its consequent inability to represent workers' interests, workers began to organise for industrial action outside the confines of COTU, with attempts made to replace COTU.[185] The first workers' union to break out of the fold of COTU and to organise a strike independent of COTU during the Moi-era was the union of medical workers in 1980. The Moi administration dealt with the striking medics by ordering them back to work.[186] The example set by medical workers was to be emulated by other workers, particularly schoolteachers and university lecturers. Teachers organised themselves under the umbrella of the KNUT. The union became active in organising industrial action in the 1990s under the leadership of Ambrose Adeya Adongo. On the other hand, university lecturers formed the Universities Academic Staff Union (UASU) as the umbrella body for all academic staff across all public universities.[187]

The Moi administration responded to the UASU with four measures aimed at containing the union. First, it undercut support for the union by instituting a hostile environment, in which both students and their lecturers operated in a state of fear, with some notable academics such as Ngugi wa Thiong'o opting for exile.[188] Secondly, the administration refused to register the union. When the leaders of the union took the matter to the judiciary for arbitration, the President vowed that the union would never be registered in the country. With the President's

[184] Akuma and Chacha, *Atwoli*, 44–53; Bedasso, 'Lords of Uhuru', 31.
[185] Akuma and Chacha, *Atwoli*, 68.
[186] K. Ngotho, 'Drama'.
[187] Nasong'o, 'Rules', 32; Odinga and Elderkin, *Raila*, 87–89.
[188] M. N. Amutabi, 'Intellectuals and the Democratisation Process in Kenya', in *Kenya: The Struggle for Democracy*, 215–217; Morton, *Moi*, 183; Kinyatti, *Gun*, 14–16.

remarks, the Court of Appeal dismissed the union's quest for registration.[189] Thirdly, the administration detained the leaders of the union, notably the union's Secretary General Willy Mutunga who was detained in 1984, along with lecturers Kamonji Wachira and Edward Oyugi.[190] Fourth, the administration instigated internal divisions among the lecturers, leading to emergence of pro-and anti-Moi administration factions among them. Collectively, the four measures left the academic staff without a union to represent their welfare, until much later in the administration's life.[191]

Overall, the Moi administration's control of the labour movement was so effective that very few leaders emerged from the movement to lead Kenya's so-called Second Liberation in the early 1990s. Of the three original vertical accountability actors inherited from the Jomo administration, the labour movement was arguably the weakest and the most thoroughly emasculated as to provide checks on government.

New Actors in State Restraint and the Moi Administration

Besides the three vertical accountability actors which the Moi administration inherited from the Jomo era, new entities emerged during the reign of the administration. This was despite the restrictive environment which the administration had set up for the rule of law and vertical accountability institutions. The entities mainly consisted of the academia, popular musicians and artistes and external actors, who included foreign embassies, foreign media and externally-funded NGOs. Whereas the academia and popular musicians and artistes fell under the general category of vertical accountability actors, externally-linked entities fell under the category of external accountability. They substantially enriched the state restraint terrain by playing significant roles in restraining the Moi administration from excesses at various stages of its life.

The Academia

The Moi administration had an ambivalent relationship with the academia, both the teaching staff and students, right from its ascent to power. This was mainly due to two reasons. On the one hand, when the administration came to power, the academia was already in a state of agitation, protesting against the treatment which the government meted out against KPU

[189]Adar and Munyae, 'Abuse', *African Studies Quarterly*, 6; J. Kamau, 'Citadel'.
[190] Owiti and Mbaya, 'Order', 56; Odinga and Elderkin, *Raila*, 92–93; Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002; 'Mutunga', *The Elephant.*
[191] Amutabi, 'Intellectuals', 206–224.

followers, the assassination of J.M. Kariuki in 1975 and the appointment of Josephat Karanja as the University of Nairobi Vice Chancellor with the accusation that the appointment was more ethnically motivated than professionally merited. On the other hand, the administration had already formed a negative opinion of the academia by the time it ascended into power in August 1978. It considered the academia a hotbed of Marxists and other radicals.[192]

In its efforts to restrain the Moi administration from excesses, the academia engaged in at least four activities. First, it staged a number of lectures which proved provocative to the administration. Among these was the annual J. M. Kariuki memorial lecture, to which government critics were invited to give lectures on public interest issues. One such lecture had been organised with the chairman of the Parliamentary Public Accounts Committee (PAC), Koigi wa Wamwere, expected to expound on the role of parliament in independent Kenya.

Secondly, the academia openly contested a number of policies adopted by the administration. One such policy was over the participation of ex-KPU politicians in the election of 1979. The administration banned the politicians from participating in the election. In response, university students took to the streets to demonstrate against the ban. Similar reactions were to be enacted by university students against the policies of the administration for much of its reign, including against the annexation of Karura forest in Nairobi and ethnic clashes during the 1992 and 1997 elections.[193]

Thirdly, the academia became the recruiting ground for anti-administration movements, especially the *MWAKENYA* group, which was formed by university students opposed to the administration. The dissident movements not only became avenues for organising undercover resistance against the Moi administration, but also participated in anti-administration events, such as the failed August 1982 coup attempt, in which university student leaders played an active role.[194] Fourth, the academia formed a trade union, the UASU, through which it organised industrial action challenging the administration. However, the union was refused registration and its leaders were thrown into detention.[195]

[192] Morton, *Moi*, 183.
[193] J. Kamau, 'Torture'; J. Kamau, 'Citadel'; Mungai, 'Confessions'.
[194] Odinga and Elderkin, *Raila*, 87–89.
[195] J. Kamau, 'Torture'; J. Kamau, 'Citadel'; Mungai, 'Confessions'.

Apart from restricting the activities of the UASU, the Moi administration employed three other measures to prevent the academia from challenging it. First, in addition to detaining Mutunga, Oyugi and Wachira as a way of containing UASU, the administration also arrested, tortured and jailed other academics and students. These included Maina wa Kinyatti, Alamin Mazrui, Mukaru Ng'ang'a, Mumbi wa Maina, Tito Adungosi, Mwangi wa Kwirikia, Onyango Oloo, Peter Ogego, Mwandawiro Mghangha and Solomon Muruli. Adungosi and Muruli died in controversial circumstances while in the hands of the agents of the administration.[196] The administration also expelled a number of students from university and subjected a number of academics to surveillance and harassment. For instance, writer Ngugi wa Thiong'o was arrested and charged for allegedly drinking outside hours in March 1979, while another don, Mukaru Ng'ang'a, was charged for abusing the chairman of the Murang'a County Council in a bar in Thika town.[197]

Secondly, the Moi administration severely prohibited academic freedom in universities as a way of containing the academia. It did this through installing a pro-government leadership in universities and ridding the universities of critical lecturers and students through a vetting process. It also deployed undercover intelligence agents to gather information on goings-on at universities.[198] The administration also cancelled lectures deemed inappropriate, an example being Koigi's lecture in 1980 on the role of parliament in independent Kenya. To forestall any street demonstrations against these measures, the administration indefinitely closed campuses.

On the other hand, the administration co-opted both students and lecturers by involving them in important events at State House so as to gain support among a section of the academic community.[199] Through use of the Kamunge Report of 1988, which recommended the introduction of cost-sharing in university education, the administration weakened the ability of universities to motivate lecturers, thus leading to brain drain and the dependence of lecturers on tokens from state agents. Further, the administration politicised the academia via political appointments of Vice Chancellors, Deputy Vice Chancellors and college principals

[196] Amutabi, 'Intellectuals', 215–217; Odinga and Elderkin, *Raila*, 92–93; Kinyatti, *Gun*, 14–16; J. Kamau, 'Torture'.
[197] Amutabi, 'Intellectuals', 215–217; Murage, 'Torture'; Gisesa, 'Mwakenya'; Kiplagat, 'Lecturers'.
[198] Sihanya, Interview.
[199] J. Kamau, 'Torture'; M. Mutiga, 'The genesis of Moi's ruthless campaign against opponents', *Daily Nation*, June 30, 2012, p. 23; K. Ngotho, 'Ruto'.

and also wrested control of universities from senates.[200] Thirdly, the Moi administration branded academics negatively, claiming in a 10 July 1990 parliamentary session that at least one of them, Ngugi wa Thiong'o was a member of the dissident cabinet of ministers that planned to replace the Moi government.[201]

By instituting a hostile environment for academic freedom, the administration ignited an exodus of academics from the country. Among these lecturers were wa Thiong'o, Micere Mugo, Ngugi wa Mirii, Kimani Gicau, Shiraz Durrani, Shadrack Gutto and Kuria Murimi.[202] The overall effect of the measures which the Moi administration instituted against the academia was to significantly reduce its ability to challenge the administration and restrain it from excesses.

Musicians

The second group which emerged during the Moi era as a restraint on the administration within the vertical accountability terrain consisted of popular musicians and artists. As had been the case with the other vertical accountability entities, the Moi administration was conscious of the power of music and art in shaping public discourse. It therefore sought to directly influence the two spheres. On the musical front, the administration restricted the music played out to the Kenyan public on the KBC, the sole broadcaster then, allowing only that which praised its policies and top personalities. In order to gain airtime, several popular bands played pro-administration songs.[203]

Besides bands, the Moi administration presided over the growth of choirs which sang songs to praise it. Among these were choirs associated with state entities, including the Kenya Posts and Telecommunications Choir, the Kenya Prisons Choir and the Muungano National Choir. Within these choirs, choir masters who composed influential songs in praise of the administration sprang up. Notable among these were Thomas Wasonga, who composed *Tawala Kenya*, Boniface Mgagha who produced *Enzi ya Nyayo* and Arthur Kemoli, who

[200] Sihanya, Interview.
[201] J. Kamau, 'Citadel'; Omari, '"Ugali"'.
[202] Gisesa, 'Mwakenya'.
[203] A. Ngaira, 'Great music in praise of benevolent strongman', *Daily Nation*, 7 February 2020, 22.

composed *Fimbo ya Nyayo*. In addition to choirs affiliated to state entities, public schools and colleges also featured prominently with choirs that sang in praise of the administration.[204]

The Moi administration further cultivated friendly ties with individual popular musicians who it deployed to praise its policies and advance its interests. The most notable of these musicians was Joseph Kamaru. The musician was included in President Moi's itinerary to Japan early in the administration's life, and on coming back, he composed a song titled *Safari ya Japani*, which praised the administration.[205]

The content of the music composed by the different groups, individuals, choirs and bands consisted of both praise for the administration and admonition for its opponents. The administration promoted the music by labelling it patriotic and ensuring it gained dominant playtime on the KBC. The music became a major enabler of the administration's excesses, including being used to fight other actors in vertical accountability.[206]

Despite the direct control which the Moi administration placed on music, a few musicians emerged to denounce the administration. The most notable of these was D. O. Misiani, who in 1989 sang *Piny Ose Mer*, which decried life under the administration. Kamaru, through the song *Mahoya Ma Bururi* (Prayers for the Nation) sang in 1989, turned away from his earlier praise for the administration and denounced its excesses, especially with the 1988 abolition of secret ballot and its replacement with queue voting. A third musician in this category was Peter Kigia, who sang *Reke Tumanwo,* in the aftermath of the assassination of Robert Ouko in early 1990. The song depicted a lover's angry call for divorce but was largely interpreted to stand for ordinary Kenyans' anger against the excesses of the Moi administration.[207]

In response to the critical music, the Moi administration banned it from either being played or sold. The administration raided joints suspected of selling the music. In some instances, the administration attempted to have the music altered by removing the critical content. This was,

[204] W. Muli, 'Moi's signature tune and making of a choir', *Daily Nation*, 7 February 2020, 23; B. Mutanu, 'I sang for Moi in the now famous Kwekwe video – NMG journalist', *Daily Nation*, 9 February 2020, 25.
[205] S. Mburu, 'Joseph Kamaru: The day Moi gave me Sh800,000 to stop my hit song', *Daily Nation*, 4 September 2009, 23.
[206] F. Mureithi, 'Retired soldier recalls intrigues of failed 1982 coup', *Daily Nation*, 1 August 2014, 3; 'Laugh', *BBC News*; Nyairo, 'Music'.
[207] Mburu, 'Kamaru'.

for instance, the case after Kamaru's release of the *Bururi* song. The administration offered the musician money to stop production of the song.[208]

With the re-introduction of political pluralism in 1992 and the subsequent liberalisation of the airwaves, a new category of musicians with a more independent and critical streak spang up. These included the Kalamashaka group, which in 1997 sang *Tafsiri Hii,* to denounce poverty and police brutality under the Moi administration; Eric Wainaina, who in 2001 sang *Nchi ya Kitu Kidogo* to denounce corruption under the Moi administration; and Gidi Gidi Maji Maji who in 2002 sang *Unbwogable,* which become the most popular campaign song for the opposition against the Moi administration.[209]

Artists

Artists consisted of two types: publishing and performing artists. The first category consisted of cartoonists and satirists who were prevented from challenging the Moi administration through the general restrictions placed on critical publications. Their work was easily labelled seditious and taken off the market alongside other outlawed publications. In this way, the administration presided over the decline of this form of art in the country. It was not until the re-introduction of political pluralism in 1990 that published art form was revived. The first piece of art to satirise President Moi was a cartoon published in November 1992 by Pius Nyamora's *Society* magazine. The cartoon was drawn by Paul Kelemba, whose artistic name was Maddo. Although both the cartoonist and the magazine's editor anticipated arrest and persecution from security agencies, this did not happen, thus allowing for a gradual expansion in the art form.[210]

Performing art re-emerged in 1998 when a group of three students from Kenyatta University acted out the character of President Moi to live audiences. Prior to its revival in the late 1990s, critical performing art had generally been under restriction since the closure of the Kamiriithu Theatre and Performance Centre run by writer Ngugi wa Thiong'o in Limuru.[211] The 1998 revival of the art form saw it expanded to a wider audience when two TV stations with a national reach, NTV and KTN, aired the performances of the three students. Through the art form, the students, Walter Mong'are, John Kiarie and Tony Njuguna, were able to

[208] Ibid.
[209] Nyairo, 'Music'.
[210] 'Laugh', *BBC News*.
[211] Amutabi, 'Intellectuals', 215–217; Nasong'o 'Rules', 32.

satirise top personalities in the Moi administration, thus making it possible to criticise the administration's excesses through satire.[212]

External Forces of Accountability and the Moi Administration

The final distinctive form of restraint on the Moi administration came from external accountability. The Moi administration was the first in Kenya's history to contend with this type of accountability. Under this form of state restraint, there were three main entities that were active in restraining the administration. These consisted of embassies of Western nations stationed in Kenya, foreign media that did critical articles on the Moi government and international development agencies and NGOs, which emerged as a significant feature in the public sphere in the 1990s. Collectively, these three entities restrained the Moi administration from excesses.[213]

Western Embassies

Western embassies had initially remained indifferent to the excesses of the Moi administration. This was mostly due to calculations emanating from Cold War politics, in which the Moi administration was viewed as a key regional ally against the Eastern bloc led by the Soviet Union. The relationship between the administration and Western countries such as the US and the UK remained cordial, with the administration receiving praise from such leaders as UK's Margaret Thatcher, who visited Kenya in 1988 and hailed it as the epitome of stability.[214]

Early attempts by a number of ambassadors from the West to hold the administration to account were easily ignored, with the administration often using the leverage it had emanating from the Cold War politics to thwart attempts by the embassies to restrain it. This was the case when the administration had the Head of EU delegation to Kenya, Achim Kratz, transferred for protesting at the manner in which the Turkwell Hydro-electric Dam project was being procured. The administration reportedly received direct support from some

[212] 'The Daring Redykyulass Trio: How their journey began', *KTN News Kenya,* YouTube video, 14 June 2018, 24:27, https://www.youtube.com/watch?v=xh09BL2Gn14; 'Laugh', *BBC News*.
[213] Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002.
[214] Morton, *Moi*, 213; Murunga, 'Adjustment', 272–278.

Western countries to evade accountability, as was the case in the 1989 murder of British tourist Julie Ward.[215]

Towards the late 1980s, especially with the easing of Cold War politics, Western countries became more assertive in restraining the Moi administration from excesses. The first case of the West sanctioning the administration for its excesses took place in 1987, when the administration was forced to cancel trips to the US and Norway due to a poor human rights record.[216] A number of ambassadors from the West became directly involved in local politics, with the most active being US ambassador Smith Hempstone. Hempstone took on the administration over its detention of multi-party campaigners. His efforts were further reinforced with a visit in August 1990 to Nairobi by Herman Cohen, the US Assistant Secretary for African Affairs, who urged Moi to allow political pluralism.[217] Hempstone also actively engaged in opposition activities, including sheltering opposition-affiliated activists at the US embassy in Nairobi, thus helping them evade arrest by security forces. In response, the Moi administration accused the ambassador of engaging in non-diplomatic activities.[218]

The West played a further role in restraining the Moi administration from attempting to extend its stay in power. This was through assuring President Moi of his personal safety once out of power. The assurance came in a meeting between President Moi and US President George W. Bush at the White House in May 2002. With guarantee of personal safety from the US government, the Moi administration went ahead and, for the first time on 28 July 2002, announced its plan to retire and hand over power after the December 2002 election.[219]

Foreign Media

As an external source of accountability against the excesses of the Moi administration, foreign media worked to often expose the administration's excesses to international, particularly Western audiences. Many international media houses had set up bureaus within

[215] S. Brown, 'From Demiurge to Midwife: Changing Donor Roles in Kenya's Democratisation Process', in *Kenya: The Struggle for Democracy*, 304–307; Adar and Munyae, 'Abuse', *African Studies Quarterly*, 4; J. Kamau, 'Daniel Moi, the perfect barnstormer in Kenyan politics', *Daily Nation,* 5 February 2020, 11; K. Ngotho, 'Turkwel'; D. Warburton, 'Julie Ward: New hope for dad of woman murdered in Kenyan game reserve 32 years ago', *Daily Mirror*, 16 August 2020, https://www.mirror.co.uk/news/uk-news/dad-murdered-photographers-new-hope-22528265, (accessed 11 November 2020).
[216] Brown, 'Demiurge', 308–313.
[217] Morton, *Moi*, 242–245; Odinga and Elderkin, *Raila*, 154.
[218] Awori, *Tiger*, 181; Morton, *Moi*, 230–231; J. Kamau, 'How Moi dealt with "rogue" diplomats', *Daily Nation*, 12 February 2020, 30; J. Kamau, 'Oyugi'; Omari, '"Ugali"'.
[219] N. Gisesa, 'Plotting the Moi succession: Intrigue, betrayal and tears', *Sunday Nation*, 13 October 2019, 30.

Nairobi to serve as their main centre for gathering news on the African continent.[220] Foreign journalists housed by the bureaus often reported on and gave substantive coverage to local issues in Kenya. One such event was the treatment of human rights lawyers Gibson Kamau Kuria and Kiraitu Murungi by the Moi administration at the height of the campaigns for a return to political plurality. The event was widely covered by *The Washington Post*'s Blaine Hardin, resulting in negative international exposure which the administration wanted to avoid.[221] A prominent case of coverage of local issues by the foreign media and which resulted in restraint in government behaviour took place during the 1992 election in the immediate aftermath of the re-introduction of multi-party politics. The media travelled to Baringo Central, President Moi's home constituency, to report on how the President's handlers would treat Amos Kandie, Moi's challenger in the election. In this case, the media's presence largely restrained the handlers from taking widely expected hostile action against the challenger.[222]

The administration discouraged foreign media from restraining it by confiscating its publications when they arrived at the JKIA and limiting the circulation of the offending publications. This was the case with *The Financial Times* when the publication carried an article on government corruption involving the Turkwell Hydro-electric Dam project. The administration also expelled foreign reporters stationed in Nairobi. This was the case with *The Washington Post*, when the administration ordered its Nairobi bureau chief to leave the country following an attempt to access the site of the Turkwell project.[223]

International Development and Human Rights Agencies and Non-Governmental Organisations (NGOs)

A final significant external restraint on the Moi administration consisted of international development agencies, particularly the IMF and the World Bank. A key component of the agencies was international NGOs, which extended their local influence by establishing local affiliates and promoting the growth of local NGOs such as the Green Belt Movement and the

[220] Kibwana, Wanjala and Owiti, *Corruption*, 61–63.
[221] Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002; Kiraitu Murungi, Oral Interview, 18/07/2002.
[222] S. Ali, 'Carnivore of Kabarak: "Mzee Moi eats meat like a lion"', *Daily Nation*, 10 December 2018, 29.
[223] K. Ngotho, 'Turkwel'.

KHRC.[224] Campaigning against human rights abuses and government excesses, these organisations often became important channels through which international agencies supported the restraint of the Moi administration. Organisations such as the American Bar Association, the Lawyers Committee for Human Rights and Amnesty International worked with local lawyers in responding to the excesses of the Moi administration.[225] The influence of these bodies on the Moi administration heightened especially in the late 1980s due to the poor performance of the economy. In 1995 in particular, the IMF and the World Bank withheld aid to the Moi government, causing a near shut-down of the government for lack of financing. The two institutions extended the suspension in June 1997, demanding the prosecution of corrupt government officials. The suspension followed a similar move that had already been undertaken by the Nordic countries (Norway, Sweden, Finland and Denmark) in the early 1990s. In order to resume aid to the country, the Moi administration was compelled to undertake significant reforms in both the political and economic realms.[226]

However, the Moi administration found ways to evade the conditionalities imposed on it by the international institutions and their local affiliates. The administration responded to the conditionalities in two main ways. For local NGOs affiliated to the international agencies, the administration used violence and regulatory restrictions to limit their activities. Towards international agencies themselves, the administration often employed propaganda to sway them from focusing on its excesses. This was the case in the 1989 when the administration charged multi-party campaigners Mirugi Kariuki and Koigi wa Wamwere with treason. The charge caused a slow-down in the support agencies such as Human Rights Watch were providing to the campaigners. The agencies accepted the administration's propaganda that the arrested campaigners were violent revolutionaries and not the multi-party campaigners they were taken to be by the agencies. They only learnt later that this was a trick by the administration to dissuade them from supporting local reformists.[227]

As for influential international bodies such as the IMF and the World Bank, the administration pretended to agree to the conditionalities the institutions imposed. However, the administration turned around and undermined the implementation of the conditionalities

[224] Nasong'o, 'Rules', 32–48; J. N. Brass, 'Blurring Boundaries: The Integration of NGOs into Governance in Kenya', *Governance: An International Journal of Policy, Administration and Institutions* 25, No. 2 (2002): 209–235; M. Lower, 'Unshakeable Elites', 7.
[225] Kiraitu Murungi, Oral Interview, 18/07/2002.
[226] Gathii, 'Anti-Corruption Strategy in Kenya', *Connecticut Journal of International Law,* 408–412; Nasong'o, 'Rules', 35–37; Nasong'o, 'Revisiting', 97–113; Rajula, 'Multi-party'; K. Ngotho, 'Panic'.
[227] Mirugi Kariuki, Oral interview, 12/08/2002.

through isomorphic mimicry or setting up of parallel initiatives which disrupted the effectiveness of institutions set up in response to the conditionalities.[228] A case in point was the fight against official corruption and in undertaking reforms within the public service to make it effective. In the fight against corruption, the administration formed various entities ostensibly to fight the vice, but they were all ineffective and met numerous obstacles in their operations.[229] In respect to reforming the public service, the Moi administration set up a so-called Dream Team composed of technocrats chosen from the private sector and approved by both the IMF and the World Bank. Led by palaeontologist Richard Leakey, the Team was expected to carry out public sector reforms to improve efficiency in the public service. Although formally empowered to carry out reforms in the public service, the Team was undermined by the informal system which the Moi administration set up against it.[230]

In conclusion, it can be noted that the Moi administration inherited a vertical accountability institutional set-up in which there were three distinct actors. These were the faith-based fraternity, the media and the labour movement. However, the three entities had been under severe strain from the Jomo administration, which undermined their capacity to restrain it. The Moi administration added to this strain. Nonetheless, there was a clear distinction between the two administrations in the way they worked to destroy vertical accountability institutions. This distinction was brought about by the fact that the Jomo administration presided over a country where some vertical accountability actors such as the media were still in their infancy and were thus easy to muzzle, while the Moi administration had to contend with these same institutions as they were maturing and acquiring new dimensions that were difficult to stifle. Some of the dimensions included having the institutions which the Jomo administration had effectively muzzled, such as the media and labour movement, re-emerging in different formations. This was the case, for instance, when teachers broke out of the fold of the COTU and began organising industrial action under their own umbrella body, the KNUT.

Further, the Moi administration had to contend with an explosion of new vertical accountability actors, as well as players in externally-driven accountability. Among the new vertical accountability actors included students and academics, underground dissident groups such as *MWAKENYA* as well as musicians and artists. Among players in externally-driven accountability were embassies of Western nations stationed in Kenya, foreign media and

[228] Lower, 'Unshakeable Elites', 8; Kanyinga, 'Dismally'.
[229] Gathii, 'Anti-Corruption Agenda', *Development Review,* 10–14.
[230] Murunga, 'Adjustment', 290–293.

international development agencies such as the IMF and the World Bank as well as their local affiliates including NGOs. As such, the Moi administration dealt with a far more complex terrain of vertical accountability and externally-driven accountability than the Jomo administration had done.

In response to the complex terrain of vertical accountability and externally-driven accountability, the Moi administration enacted two major measures. First, it inserted itself into a section of each of the vertical accountability actors and repurposed them to its own interests. For instance, the administration bought sections of the media and became directly in charge of it. This resulted in two types of media, pro- and anti-establishment. This was extended to the rest of vertical accountability actors, leading to a situation where each vertical accountability actor under the administration had two sides, with one side being a proponent of the administration, while the other remained critical of it. This gave rise to pro-administration clergymen, academics, musicians and media personalities, while creating clergymen, academics, musicians and sections of the media which were critical of the administration.

On the other hand, the Moi administration retained and escalated the hostile restrictions and violence inherited from the Jomo era against vertical accountability institutions. In addition to the old forms of repression such as detention without trial and exile, which had been instituted during the Jomo era, the actors faced new forms of repression such as torture and confiscation of publications that the Moi administration instituted. As for externally-driven accountability, the Moi administration dealt with this by evading the conditionalities they imposed on it and instituting parallel initiatives which frustrated efforts at reform sought by externally-driven accountability.

Both measures, the escalation of a hostile environment for critical sections of vertical accountability actors while co-opting other sections and evading externally-driven accountability, had two main effects. On the one hand, the measures did little in destroying the capability of a number of actors within the accountability terrain to restrain the Moi administration. This was the case with the clergy, the labour movement, the media and musicians and artists, all of which retained within them sections which still remained critical of the administration, in spite of the measures. On the other hand, the measures led to decline of at least one actor as a force in vertical accountability. This was the academia. The main reason for the decline of the academia as a vertical accountability force was due to its heavy

dependence on financial remittances from the Moi administration, unlike the media, the labour movement and the clergy, which had independent sources of funding. Through the financial control, the administration was able to rid the academia of critical voices, thus leaving it with no ability to challenge government.

The Moi administration thus left behind an environment consisting of escalating hostility against critical sections of vertical accountability actors and increasing co-optation of others, continuing emasculation of formal checks and balances institutions and their deployment to serve the administration's partisan interests as well as evasion of externally-driven accountability. This was the environment under which the LSK operated during the administration's reign. How the organisation engaged in restraining the administration from excesses under this environment is discussed below.

4.4 LSK and the Excesses of the Moi Administration

When the Moi administration ascended to power in August 1978, the LSK was just emerging out of its main challenge of racial division, which had made it unable to effectively focus on the country's rule of law terrain. The organisation's leadership had just swung in favour of indigenous Kenyan lawyers, with the chairmanship shifting from K.C. Gautama, who became the last non-indigenous Kenyan to hold the position, to Amos S. Wako, who served between 1979 and 1981. Beginning with Wako, the chairmanship became confined to indigenous Kenyan lawyers. Besides Wako, the other chairmen of the organisation during the Moi era were Lee Muthoga (1981–1982), Mutula Kilonzo (1982–1984), G. B. M Kariuki (1984–1986), Joe W. Okwach (1986–1988) and Fred Ojiambo (1988–1990). Others were Paul Muite (1991–1993), F. W. Kagwe (Acting – 1993), Willy Mutunga (1993–1995), Paul Wamae (1995–1997), Nzamba Kitonga (1997–1999), Gibson Kamau Kuria (1999–2001) and Raychelle Omamo, the first woman LSK chairperson (2001–2003).[231]

The rise in dominance of indigenous lawyers in the LSK leadership had an immediate effect on the organisation. It became more involved in issues of the rule of law. Granted, this shift in focus began even before the end of the Jomo administration and the swing in LSK leadership towards indigenous Kenyans. For instance, under the chairmanship of Gautama, the organisation engaged in at least two activities which directly challenged the Jomo government. The first activity consisted of hosting a conference in April 1978 in which the

[231] The Law Society of Kenya Website: https://lsk.or.ke/about-us/ (accessed on 9 November 2018).

organisation declared its intention to protect judicial independence. The second activity involved directly challenging the Capital Gains tax imposed in June 1978 by the Jomo administration's last Finance Minister Mwai Kibaki.[232] The ascendancy of the Moi administration thus coincided with a rising focus on issues of the rule of law within the LSK.

Nonetheless, in the initial days of the new administration, the LSK saw in it an opportunity to advance the welfare of its members. This was through requesting the administration to revive the foundering Africanisation programme within the judiciary by having indigenous lawyers appointed into the institution. The Moi administration reacted positively to the request by appointing two new judges from amongst indigenous lawyers. These were J. O. Masime and J. M. Gachuki. Pleased with the appointments, the LSK took them as a sign that the Moi administration would have a more respectful attitude towards indigenous lawyers than had the Jomo administration before it.[233]

This positive attitude towards the Moi administration by the LSK was further reinforced when the administration transferred the long-serving AG Charles Njonjo from the AG's docket to the Justice and Constitutional Affairs Ministry in the aftermath of the 1979 general election. Njonjo's presence in the AG's office had been part of the reasons why indigenous lawyers had been kept out of the LSK leadership for almost the entire duration of the Jomo administration. One of his very last anti-LSK measures prior to being moved to the Justice and Constitutional Affairs docket had been to bar LSK council members from participating in the 1979 election. His departure from the office was therefore seen as providing opportunity for the rise in the indigenous dominance of the LSK.

James Karugu, Njonjo's replacement as AG further helped in advancing the initial LSK goodwill towards the Moi administration by cultivating friendly ties with the organisation. He suggested to the organisation that the Moi administration considered it an ally in the task of protecting the country's democratic ideals, freedoms and independence of checks and balances institutions such as the judiciary. In addition, the administration's decision to release all political detainees served to further indicate to the LSK that the administration was serious in terms of restoring respect for the rule of law in the country.[234]

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[232] 'Kenya Law Society goes for New Image', *The Weekly Review,* 12 May 1978, 9–11; 'Taxation Still No Gain', *The Weekly Review,* 23 June 1978, 26–27.
[233] 'President Appoints New African Judges', *The Weekly Review,* 29 August 1980, 18.
[234] 'Red Carpet for James Karugu', *The Weekly Review,* 22 August 1980, 22; Nowrojee, 'Profession', 43–46.

However, the initial goodwill and cordiality between the Moi administration and the LSK fizzled out within a short time. The first break in cordiality between the two entities took place in May 1979 over two main developments. The first development was with regard to the participation of the LSK council members in the 1979 general election, the first under the Moi administration. Through Njonjo, who was still the AG, the administration published Legal Notice No. 87 on 11 May 1979, which contained two provisions that directly affected the LSK. The first provision required that for LSK council members to contest in the election, they had first to resign from the council. It had the immediate impact of barring Samuel Kivuitu, K. C. Gautama and J. Miruka-Owuor, all who were LSK council members, from contesting in the election.[235] The second provision from the Legal Notice was over campaign finances. It capped campaign expenditure at Kshs. 20,000 only. The LSK, along with incumbents and prospective candidates, opposed the move as impractical. LSK's opposition to the measure was because it was going to be applied retrospectively, which was against universal legal norms.[236]

The second development, still in May 1979, was over at least two of the administration's pronouncements in the country's land sector. The first pronouncement was with regard to compulsory acquisition of land, which allowed the Commissioner for Lands to acquire land without compensating those who occupied it. The LSK opposed the measure, citing cases in which the Commissioner had published notices in the official gazette for compulsory acquisition of land but had not indicated what the land would be used for. To LSK, this raised suspicion that the policy was being used by powerful individuals to enrich themselves by acquiring pieces of land across the country. A similar practice had taken hold in the country's mining sector. To curb the practice, the LSK proposed reforms in the land sector as well as respect for due process.[237]

Disagreements between the Moi administration and the LSK were further exacerbated in February 1981 when President Moi directed that land disputes be settled by elders and the Provincial Administration, rather than by the judiciary. The President argued that settling the disputes in the judiciary exposed illiterate citizens to defrauding by lawyers. The LSK, through its chairman Amos S. Wako, rejected the President's directive. Deliberating on the directive in an LSK council meeting held on 12 June 1981, the organisation argued that the

[235] 'Election Rules, Wrong Notice: Candidates not affected', *The Weekly Review,* 27 July 1979, 9.
[236] 'Low Ceiling: election expenses bill unclear', *The Weekly Review,* 17 August 1979, 8.
[237] 'Cases of impropriety undermining rule of law', *The Weekly Review,* 18 May 1979, 24.

judiciary was the best suited institution to deal with disputes over land. It further urged that before the government issued such a drastic policy change touching on the rule of law in the country, the LSK should be consulted. It also expressed fear that the President's directive would lead to abuses in the land sector.[238] The LSK's response to the President's directive elicited an angry rejoinder from the President. He accused the LSK of being self-centred in opposing the directive and went ahead to decree that in spite of the LSK's protestations, the directive would stand.

Due to the hostility from the administration, the LSK apologised to the President, and declared its support for the new directive. In justifying its climb-down, the LSK claimed that the presidential directive was in line with the Swynnerton land consolidation plan, and was aimed at recognising customary land rules, which the plan had initially ignored. It therefore supported the implementation of the directive, although it issued occasional murmurs in which it complained that having the Provincial Administration handle land cases only compounded the cases further, rather than resolving them.[239]

After the confrontation over policies in the land sector, the disagreements between the LSK and the Moi administration became routine. The disagreements were further exacerbated by the changes which the Moi administration instituted in the state law office where the LSK-friendly AG James Karugu resigned in July 1981. With Karugu's departure, Njonjo re-asserted his control over the AG's office by appointing Joseph Kamere as Karugu's successor. Through Kamere, Njonjo resumed the antagonisation of the LSK, mainly by denigrating the quality of indigenous lawyers who were now a dominant force in the LSK and in leading the Moi administration towards abandoning the Africanisation policy in the justice sector.[240]

Months after climbing down in the dispute over land policies, LSK was by October 1981 back in the limelight. This time round, it pushed for the accommodation of Muslim interests in the law of succession. Although the judiciary, headed by Chief Justice Sir James Wicks, claimed that the law accommodated Muslim interests, Muslims disagreed. To resolve the emerging impasse, the LSK organised a workshop where it had the law reopened and

[238] 'Updating Swynnerton: Lawyers and President seek better solutions for Land Disputes', *The Weekly Review,* 13 February 1981, 21–22.
[239] 'Swynnerton', *The Weekly Review*; 'LSK dissatisfied', *The Weekly Review,* 23 May 1986, 8.
[240] Mwaura, 'Optics'.

examined to establish if indeed it accommodated not just Muslim perspectives, but also perspectives from women groups, the academia and traditionalists.[241]

In March 1982, the LSK, under the leadership of Lee Muthoga, teamed up with the NCCK to form the Public Interest Law Institute Limited (PILIL). Although both the LSK and the NCCK asserted that the main purpose for setting up the company was to champion public interest causes such as consumer and environmental protection, the coming together of the two organisations raised questions from the Moi administration.[242] By May 1982, the heat generated from the formation of the PILIL forced both LSK and NCCK to jointly issue additional information. The organisations insisted that their intention in forming the PILIL was not to challenge the Moi administration. However, in defending the PILIL, they broached the subject of the re-introduction of detention without trial. The Moi administration had just thrown its first detainee, Stephen Mwangi Muriithi, into detention that very month. The two organisations protested the re-introduction of the measure, arguing that detention would undermine the rule of law in the country.[243] In response, the government dismissed their concern, insisting that the President had powers to detain anyone without trial. It even went ahead and received endorsement for the measure from the judiciary, with Justices Alan Hancox and Zacchaeus Chesoni ruling that detention was legal under the Preservation of Public Security Act.[244]

The concern over detention without trial was soon overtaken by concern at the passage of Section 2A through a constitutional amendment in June 1982. The amendment made Kenya a de jure one-party state, with KANU the only legal political party. The LSK indicated its disagreement with the change to the law by insisting that the change to the Constitution did not mandate the President to abolish existing institutions. In response, the AG dismissed the LSK protestations by quoting Section 24 of the Constitution which permitted the President to institute, abolish and terminate offices.[245]

The August 1982 coup attempt brought a new dimension to the relationship between the Moi administration and the LSK. The attempt led the Moi administration into a series of crackdowns, detention and court martials of alleged coup plotters. The LSK's response to this

[241] 'Law of Succession: Diverse Views', *Weekly Review,* 16 October 1981, 9.
[242] Odinga and Elderkin, *Raila*, 87; 'Lawyers are of Great Integrity', *The Weekly Review*,12 March 1982, 20.
[243] Odinga and Elderkin, *Raila,* 87.
[244] 'No challenge to the Government', *The Weekly Review*, 7 May 1982, 7; Kamau, 'Ex-Intelligence Boss'.
[245] 'Kenya Becomes One-Party State by Law', *The Weekly Review,* 11 June 1982, 4.

development largely remained anonymous. This left the defence of the suspects in the hands of a few individual lawyers. Two of the active individual lawyers who took on these cases were Gitobu Imanyara and Moses Wetangula, both of whom took on the cases at a great risk to themselves and their careers.[246]

In November 1986, the LSK, under the chairmanship of G. B. M. Kariuki, broke out of its silence over matters of the rule of law when it protested a new change to the law. This time round, the organisation was concerned over the removal of security of tenure for checks and balances institutions, which the Moi administration intended to abolish through a bill published in a special issue of the Kenya Gazette of November 14, 1986. The bill targeted the offices of the Attorney General and the Controller and Auditor-General and the Public Service Commission. As part of the changes, it also sought to abolish the office of the Chief Secretary, which had long been occupied by Simeon Nyachae. The LSK cautioned against the move, stating that security of tenure was an important tenet to ensure the independence of the checks and balances institutions.[247]

Due to LSK's silence in the face of the rule law violations by the Moi administration, individual lawyers increasingly took on the mantle of defending the rule of law. Following in the footsteps of Imanyara and Wetangula in relation to the 1982 coup attempt suspects, lawyers such as Gibson Kamau Kuria became active in providing legal services to dissidents thrown into custody by the Moi administration. This was especially the case from 1986, with increased government crackdown on the suspected *MWAKENYA* dissidents.[248] The LSK responded to these individual lawyers in two ways. First, it remained largely unsupportive of their efforts. Instead, it sided with the Moi administration, with LSK chairman Joe W. Okwach going to the extent of releasing a statement in 1987 pledging LSK's unwavering support for the President, the government and the ruling party KANU.[249] More critically, when the administration turned its guns on lawyers representing dissidents, the LSK distanced itself from them. This was the case for instance in August 1987, when the organisation distanced itself from pronouncements made by a British lawyer, Lord Gifford, who had claimed that the Moi administration was persecuting lawyers for doing their work.

[246] *Roll of Honour,* The Law Society of Kenya; J. Wanga, 'Secrets of Uhuru, OKA talks and my time with Moi, Kibaki', *Sunday Nation*, 23 January 2022, 13.
[247] 'Sharp differences on Constitutional Bill', *The Weekly Review*, 28 November 1986, 3; K. Ngotho, 'LSK's lost clout and a look at the days when lawyers led from the front', *Sunday Nation*, 8 March 2020, 29.
[248] Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002.
[249] Odinga and Elderkin, *Raila*, 132.

The lawyer made these claims in reaction to the administration's detention of Mr. Kuria, who was then providing legal services to government critics. Okwach not only refuted the British lawyer's claims, but also went ahead and suggested that lawyers falling afoul of the Moi administration had done so not necessarily because of their professional and legal work. Citing the rule of sub judice, the LSK chairman claimed that LSK could not comment on the reasons for the lawyers' detention by the Moi administration.[250]

However, Okwach's defence of the Moi administration was short-lived. In September 1987, he led the organisation in protesting at one of the most significant changes to the Constitution which the Moi administration enacted. This was the change to the country's electoral system which abolished the secret ballot and replaced it with queue voting. In opposing the change, Okwach rejected both the proposed change to the law, as well as the process of amending the constitution. In terms of the proposed change, he argued that he found it not only unnecessary to expose the constitution to an amendment in order to enact the proposed electoral law, but also that amendments such as the one being contemplated then were reducing the constitution's sacrosanctity as the country's supreme law.

In terms of the process of amending the constitution, Okwach called for an open process to making laws in the country, urging that laws such as those touching on the country's electoral process should be subjected to thorough public debate. Given that there was no official political opposition that represented public interest, Okwach offered the LSK as the institution to play this role.[251] The Moi administration dismissed Okwach's opposition to the new law by insisting that the proposed amendment would go ahead. The administration also confined the process to parliament, arguing that parliament was the only legally mandated institution to enact changes to the Kenyan constitution and that the public had little role in the process.[252]

In August 1988, the government, perhaps as a direct indication of the desire to control the LSK, hinted at amending the LSK Act of 1962. The Act was the principle legal framework giving the LSK its statutory mandate in promoting and protecting the rule of law in the country. Hints at amending the Act had begun as early as 1986, when the LSK opposed changes to the Independence Constitution which abolished security of tenure within the

[250] 'Differing Views about Kenya's Lawyers', *The Weekly Review*, 28 August 1987, 11.
[251] 'Parliament amends the Constitution with Surprising Alacrity', *The Weekly Review*, 5 August 1988, 3.
[252] 'Calls for Public Debate on Queuing', *The Weekly Review*, 5 September 1986, 4.

checks and balances institutions.[253] The proposal ignited a two-year battle between the LSK and the Moi administration, with the LSK remaining opposed to the amendments. In attempting to placate the LSK, the administration, through AG Matthew Guy Muli, shifted its attention away from the LSK Act and to the Advocates Act. Whereas the LSK Act mostly dealt with it as a statutory institution, the Advocates Act targeted the entire legal profession. With the shift, the government explained that its intention was to institute professionalism in the legal profession as a whole, rather than target the LSK as a statutory institution.[254] Even with the shift to the Advocates Act, the LSK remained suspicious of government intentions. It argued that it did not see the necessity of the planned amendment, insisting that the LSK disciplinary committee established under existing law already dealt with issues of lawyers' professionalism and therefore there was no need of a new law for the same.[255]

Further deterioration of the rule of law under the Moi administration was to force the LSK into more vigorous protests. In early 1989, it protested at the amount of time police officers were taking to arraign people in court after arrest. This was at the height of widespread arrests of government critics, with the state holding onto the suspects in torture chambers to compel them to confess to the crimes the state slapped on them. To reduce the amount of time taken in government custody, the LSK cited the constitutional provision which required that suspects be presented in court within 24 hours of their arrest. Responding to the LSK demand for presentation of suspects in court within 24 hours of their arrest as provided for by the Constitution, both the Vice President Josephat Karanja and the AG took to the floor of parliament to dismiss the demand. Whereas the AG called the LSK demand as 'uninformed,' the Vice President ridiculed not just the LSK but also the NCCK, which had backed the LSK's concerns, as being 'irrelevant' and '(exhuming) doctrines that have been eroded by time.'[256]

Incidentally, both the LSK and the NCCK were to come to the Vice President's rescue later in April 1989, when he was ousted from office. While Karanja appealed directly to clergymen such as ACK's David Gitari to save him from the ouster, the LSK protested at the

[253] Kegoro, Interview.
[254] Cockar, *Doings*, 190; 'Reviewing the Advocates Act', *The Weekly Review*, 26 August 1988, 12.
[255] 'Law Society under Pressure', *The Weekly Review*, 26 August 1988, 12.
[256] K. Ngotho, 'How Vice-President Dr Josephat Karanja was humbled', *Sunday Nation*, 27 May 2018, 30.

action. The LSK argued that the Vice President should be offered an opportunity to defend himself from accusations levelled against him in removing him from office.[257]

The last major confrontation between the LSK and the Moi administration prior to the shift to the struggle for the restoration of political pluralism was in November 1989, over the question of documentation of Kenyans of Somali ethnic origin. The LSK protested at the measures which the government had put in place for vetting members of the community who sought Kenyan identity. The measures compelled those seeking Kenyan documentation to undergone extensive vetting by the Provincial Administration. The LSK protested at the measures, citing Section 82 of the Constitution, and stating that no Kenyan should be subjected to discrimination in seeking government services. The government defended the measures by citing Section 6 of the Registration of Persons Act and explaining that the law permitted the Registrar of Persons to place special demands on anyone who sought Kenyan documentation.[258]

The campaign for a return to multi-party politics which began in earnest in early 1990 was to become one of the most definitive phases in the relationship between the LSK and the Moi administration, with the organisation pouring its energies into the campaign.[259] The LSK did this in at least two main ways. First, the organisation openly became part of the campaigns, with LSK members, including current and former chairmen and council members participating. Paul Muite, the LSK chairman from 1991 led the organisation in calling for registration of a party proposed by Jaramogi Oginga Odinga.[260] Along with Gibson Kamau Kuria and lawyer Kiraitu Murungi, Muite became directly involved in drafting the statement read by politicians Kenneth Matiba and Charles Rubia on 4 July 1990, which set in motion the call for a return to a multi-party system in the country.[261]

The LSK's involvement in the multi-party campaign was so intense such that in the special session of parliament summoned on 10 July 1990 to condemn the first Saba Saba rally held on 7 July 1990, at least five members of the LSK came in for special attention. The members were listed as having links to the alternative government which the Moi administration claimed was being clandestinely constituted to replace it. These were former LSK chairman

[257] Gitari, *Troubled*, 264; K. Ngotho, 'Clout'.
[258] 'Vetting raises Hackles', *The Weekly Review,* 17 November 1989, 17.
[259] Odinga and Elderkin, *Raila,* 185.
[260] Ibid, 158.
[261] Gichuhi, 'Gallant'; Kiraitu Murungi, Oral Interview, 18/07/2002.

G. B. M. Kariuki, who the government claimed was the alleged clandestine government's Attorney-General, Gibson Kamau Kuria, who was allegedly the Chief Justice, John Khaminwa, who was allegedly the Deputy Public Prosecutor, Paul Muite, who was allegedly the Head of Civil Service and Gitobu Imanyara, who was allegedly the Solicitor-General.[262]

The second way in which the LSK was involved in the campaign for the return to multi-party democracy was in demanding for the decriminalisation of the campaign for a return to multi-party politics and in defending those arrested and prosecuted by the government for their involvement in the campaign. Led by Muite, the organisation demanded for the repeal of the 1966 Preservation of Public Security Act, which was the basis for detention without trial of the multi-party crusaders.[263]As for defending those arrested and prosecuted, LSK members who were active in offering services to the detainees included John Khaminwa, Paul Muite, Gitobu Imanyara, Gibson Kamau Kuria, James Orengo, Kiraitu Murungi and Martha Karua. Murungi and Kuria were instrumental in defending Raila Odinga, one of the most visible campaigners for a return to political pluralism, who had been detained at the Shimo la Tewa Prison. Muite on the other hand represented Kenneth Matiba, another leading campaigner for a return to multi-party politics.[264]

After the restoration of political pluralism in late 1990, the LSK embarked on a discernible effort to rehabilitate the country's rule of law system. This targeted the main checks and balances institutions. The first institution to be targeted for rehabilitation in this way was the constitution. As early as 1994, the LSK joined other organisations in demanding for a complete review of the country's heavily-amended Independent Constitution. It went ahead and drafted a model constitution which it insisted would restore the rule of law in the country.[265]

The second institution targeted for rehabilitation was the judiciary. Here, the LSK took two measures. First, it wrote a letter to the UK Home Secretary Edward Hurd demanding that the UK government stops funding the Kenyan judiciary until the institution was completely independent of executive interference. In the letter, the LSK complained that the judiciary under both the Jomo Kenyatta and the Moi administrations had been used to serve executive

[262] Omari, '"Ugali"'.
[263] Odinga and Elderkin, *Raila*, 158.
[264] Odinga and Elderkin, *Raila,*121; Obonyo, 'Forgiveness'; Gichuhi, 'Gallant'; Mwangi and Holmquist, 'Transparency', 18.
[265] Odinga and Elderkin, *Raila*, 282.

interests, including suspension of the Bill of Rights during the tenure of Chief Justice Cecil Miller. However, the UK government did not defund the judiciary as demanded by the LSK.[266]

The second measure which the LSK took in an attempt to rehabilitate the judiciary was to call for a judicial probe against two members of the judiciary who the organisation accused of having aided the executive to subvert judicial independence. These were the Chief Justice Alan Hancox and Justice Norbury Dugdale. The two judges were accused of having facilitated the worst of the Moi administration's excesses by lending judicial support to the excesses. To give their demand substantial weight, the LSK mobilized up to 107 lawyers in September 1991 to sign a memorandum which demanded for disciplinary action against the two judges. To put further pressure on the judiciary, the organisation staged regular protests against corruption in the judiciary.[267]

The LSK extended similar measures to the AG Amos Wako, especially in the wake of the Goldenberg Scandal. In December 1994, under the chairmanship of Willy Mutunga, the organisation instituted a private lawsuit against the AG and 6 other leading suspects implicated in the Scandal. It accused the AG of having failed to institute criminal charges against the suspects and for having instead tried to cover up the Scandal. However, the lawsuit was scuttled by the AG and a magistrate's court, both of which held that the LSK had no *locus standi* on the matter.[268]

The third rule of law institution which the LSK worked to rehabilitate after the re-introduction of pluralist politics was parliament. The organisation contributed a substantial number of members affiliated to it to the new multi-party parliament. Once inside parliament, the LSK-affiliated members used the new platform to extend the work of restraining the Moi administration from excesses which they had begun under the LSK. From parliament, they worked to restore the independence of some of the institutions which had been devastated by executive control.

Beyond parliament, LSK-affiliated members also became active in major political parties as well as emerging entities such as externally-funded NGOs. They used these new positions to

[266] Adar and Munyae. 'Abuse', *African Studies Quarterly*, 6; J. Kamau, 'Citadel'.
[267] Kibwana, Wanjala and Owiti, *Corruption*, 45; Cockar, *Doings*, 246; Odinga and Elderkin, *Raila*, 161.
[268] Gathii, 'Anti-Corruption Strategy in Kenya', *Connecticut Journal of International Law*, 433–435; Maina, *State Capture*, 16.

not only rehabilitate the political opposition as an institution, but to also restrain the Moi administration from excesses. A case in point was the work of the lawyer Mirugi Kariuki, who used his influence within the International Bar Association (IBA) to shift its focus towards human rights issues in developing countries, aside from commercial law. Through the IBA's human rights institute that Mirugi helped set up, the lawyer was able to facilitate a visit to Kenya by both the IBA and the English Law Society in 1996. The two visiting organisations released a report critical of the Moi's administration's relationship with the judiciary. Donors used the report to increase pressure on the administration to reform the judiciary.[269] Another lawyer, Gibson Kamau Kuria provided information on detention in the country to crucial stakeholders such as Amnesty International and the Lawyers Committee for Human Rights through the cases he litigated as defence lawyer for those detained.[270]

The lawyers also vigorously defended the opposition when it was subjected to persecution by the administration. This was the case in April 2001, when up to six LSK-affiliated members lined up to defend two central Kenya MPs, who had been arrested and arraigned in court on charges of treason, arising from remarks they had made at a political rally in Meru. The lawyers' action forced the AG to drop the cases against the MPs.[271]

The increasing presence of LSK members in important institutions such as parliament, political parties and NGOs such the Centre for Law and Research International (CLARION) ensured that the members remained active in the next phase of the campaign against the excesses of the Moi administration. This largely revolved around a demand to overhaul the heavily-amended Independence Constitution to restore the cardinal principles of the rule of law, which had been emasculated by both the Jomo and Moi administrations. The LSK, working both as an independent institution and through its members in parliament, political parties and NGOs, led in aspects of the campaign. This included aligning with the Ufungamano constitution review initiative fronted by FBOs and CSO.[272]

[269] Mirugi Kariuki, Oral interview, 12/08/2002.
[270] Gibson Kamau Kuria, Oral Interview, 12/07/2002 and 03/08/2002.
[271] C. Gatheru and M. Munene, 'Two Central Kenya MPs charged with treason and incitement', *Daily Nation*, 3 May 2001, 6.
[272] Nasong'o, 'Rules', 33.

4.5 Moi Administration's Responses to LSK

In responding to the LSK, the Moi administration used the same set of tactics which had been applied against other institutions of state restraint. These consisted of deployment of state agencies to harass, intimidate and cower administration opponents; branding of opponents negatively; co-opting significant sections of the opponents; and exploiting opponents' weaknesses to the advantage of the administration. Each of these tactics was deployed against the LSK.

The main state agency deployed against the LSK was the state law office, headed by the AG. Apart from James Karugu, whose stint as AG lasted slightly more than a year, the rest of the AGs who served under the Moi administration were hostile to the LSK. An especially hostile AG was Matthew Guy Muli, who replaced Joseph Kamere in the aftermath of the 1982 coup. To discourage lawyers such as Gitobu Imanyara from representing government dissidents, Muli had the lawyer investigated and thrown into Kamiti Maximum Prison on a charge of having issued a bounced cheque.[273] In another case in 1991, Muli had LSK council members and their chairman Paul Muite convicted for contempt of court and individually fined Kshs. 10,000 for leading efforts to abolish the government's powers of detention without trial.[274] The hostility between the AGs and the LSK continued into the tenure of Amos Wako, who incidentally had been the chairman of the LSK at the beginning of the Moi era. Overall, not only did the AGs maintain hostile relations with the LSK, they also actively worked to prevent the organisation from challenging the Moi administration on issues of the rule of law.[275]

Another state agency deployed against the LSK was the national intelligence agency, the so-called Special Branch. It formed a critical component of the specially-tailored criminal justice system which the Moi administration mobilised and repurposed and deployed to deal with LSK members critical of his administration. The system was used to detain a number of lawyers, among them Gibson Kamau Kuria, John Khaminwa, Willy Mutunga, Lenny Gacheche, Gitobu Imanyara, Muhamed Ibrahim, Rumba Kinuthia, Wanyiri Kihoro, Gupta Ng'ang'a Thiong'o and Mirugi Kariuki. It was also responsible for sending to exile lawyers Kiraitu Murungi and James Orengo, and for the surveillance of lawyers Paul Muite, Japheth

[273] *Roll of Honour,* The Law Society of Kenya.
[274] Havi Nelson (@NelsonHavi). 'Read this letter from Dr. Kamau Kuria SC', *Twitter,* 13 November 2020, 5.08pm, https://twitter.com/NelsonHavi.
[275] 'Kenya Law Society clashes with Kamere', *The Weekly Review,* 23 October 1981, 4.

Shamalla, Beatrice Nduta, Martha Karua, G. B. M. Kariuki, Pheroze Nowrojee and Mbuthi Gathenji.[276] The President himself also issued direct threats to LSK members, as was the case on Jamhuri Day, 12 December 1989, when he challenged the LSK leadership to a physical duel for criticising his government. LSK leaders faced additional threats from minor KANU officials, with at least one such minor official threatening to mobilise a group to raid and raze down the LSK headquarters in Nairobi. In directly intimidating the LSK, a trend emerged in which LSK members would be branded negatively like being puppets of foreign interests.[277]

Besides targeting the LSK as an institution, the Moi administration also targeted firms belonging to individual lawyers at the forefront of challenging the administration's disregard for the rule of law. A case in point was the law firm jointly owned by Gibson Kamau Kuria and Kiraitu Murungi. The firm was threatened with closure and had contracts it had entered into with government withdrawn. In addition, the administration posted officers from the Special Branch who discouraged clients from physically accessing the firm, thus jeopardising its viability as a business.[278]

The Moi administration, just as it had done with other institutions of vertical accountability, infiltrated the LSK where it employed divide-and-rule tactics to ensure the organisation would not speak with one voice against government excesses. This resulted in the emergence of pro- and anti-Moi administration factions in the LSK. As part of evidence of the existence of pro-establishment lawyers within LSK, at least one lawyer called for the affiliation of LSK to the ruling party KANU, as had happened with the labour and women's movements. Due to the presence of the two factions in the LSK, the organisation failed to have a coherent position on violations of the rule of law such as detention without trial. This was exhibited in June 1989, when a LSK branch chairman in the Rift Valley blasted lawyer Mirugi Kariuki for not thanking the President after release from detention.[279]

The inability to achieve consensus in the LSK over issues of the rule of law was further exacerbated by the rhetoric each of the two factions employed to justify the positions they took. The pro-establishment faction mostly pushed the rhetoric that the LSK should remain apolitical, independent and non-partisan, while the anti-establishment faction asserted that

[276] Owiti and Mbaya, 'Order', 56; P. M. Robert, *Peaceful Resistance*; K. Ngotho, 'Clout'; Nowrojee, 'Profession', 38.
[277] K. Ngotho, 'Clout'; Mshindi, 'Encounters'; 'Stop It', *The Weekly Review*, 19 August 1988, 7.
[278] Kiraitu Murungi, Oral Interview, 18/07/2002.
[279] Mirugi Kariuki, Oral interview, 12/08/2002.

remaining apolitical was a convenient cover used by the pro-establishment faction to continue supporting the Moi administration. It should be noted, however, that some of the anti-establishment lawyers were accused of duplicity, largely because they had remained silent in the face of state excesses under the AG Charles Njonjo and only became vocal when he was purged from government in 1983.[280]

A major tactic used by the Moi administration to infiltrate the LSK and install a pro-establishment faction was through internal LSK elections. The administration would identify and provide support to candidates from the pro-establishment faction. This was manifested in the LSK elections of 1989 in which the administration provided support to a pro-establishment faction, which controversially won the election.[281] Due to the controversy surrounding the election, the resulting tenure of Fred Ojiambo as LSK chairman was marked by deep divisions in the organisation. One faction within the organisation consisting of lawyers such as Paul Muite, Martha Karua, Githu Muigai, Gibson Kamau Kuria and Joseph Shamalla opposed Ojiambo's tenure. On the other hand, lawyers Stephen Mwenesi, Mutula Kilonzo and Kokokonya Mukolongola supported the tenure and were counted among the pro-establishment lawyers.[282]

Despite the challenge mounted against his tenure by the anti-establishment faction, Ojiambo enabled the Moi administration to advance in its attempts to control the LSK. This was mostly through enacting changes to regulatory and legal frameworks for the legal profession. The changes not only brought the legal profession under increasing control of the administration but were also justified on the basis of internal weaknesses in the legal profession in general and the LSK in particular. The most cited of these internal weaknesses were two. First, unprofessional conduct among lawyers, which was manifested in their involvement in swindling of clients' insurance claims money, corruption and land grabbing. Secondly, the incapacity of the LSK to enforce ethical standards amongst its members.[283] Citing unprofessional conduct amongst LSK-affiliated lawyers, the Moi administration had earlier in 1985 rejected LSK chairman G. B. M. Kariuki's calls to replace the outgoing non-

[280] Sihanya, Interview.
[281] Adar and Munyae, 'Abuse', *African Studies Quarterly*, 5; Mirugi Kariuki, Oral interview, 12/08/2002.
[282] Nowrojee, 'Profession', 39; Sihanya, Interview; Nasong'o, 'Rules', 33; K. Ngotho, 'Clout'.
[283] P. Mwangi, 'Cartels in the legal profession. How lawyers are actors and accessories to corruption', *Sunday Nation*, 13 January 2019, 17; Ghai, 'Profession', 12; P. Nowrojee, 'Profession', 37; Manji, 'The Grabbed State', *The Journal of Modern African Studies*, 467–492; F. Sichale, 'The Challenges of Improving and Maintaining Ethics and Standards in the Legal Service' (presentation, the LSK Annual Conference, Leisure Lodge Beach and Golf Resort, Mombasa, 11–12 August, 2009).

indigenous Chief Justice, Alfred Simpson with an indigenous one.[284] From 1986, the administration cited corruption among lawyers to commence a protracted and disputed process of amending the Advocates Act, ostensibly to strengthen disciplinary mechanisms in the legal profession. Brushing aside LSK's protestations that the amendment was unnecessary due to an already existing LSK Disciplinary Committee, by 1988 the Moi administration had succeeded in setting up the Advocates Complaints Commission, whose members were to be directly appointed by the President. The change enabled the administration to wrest control of lawyers' disciplinary process from the LSK.[285]

A similar wresting of control of lawyers' regulation from the LSK occurred in the same year, when the administration enacted a trade licensing policy which compelled lawyers to seek operational licenses from the Ministry of Trade. This change had the effect of putting the legal profession under direct bureaucratic control of a state functionary.[286] Additionally, the administration tied the legal profession to nationality, confining it to only Kenyan citizens. This was seen as an attempt to reduce the influence of expatriates on the country's evolving rule of law terrain, especially in light of a crackdown on dissidents like Koigi wa Wamwere, whose cases attracted external legal support.[287] The changes in the disciplinary and regulatory frameworks for the legal profession collectively subjected it to a heavy regulatory regime, which had at least five regulatory measures. This made it the most regulated profession in the country.[288]

Besides wresting disciplinary and regulatory control of lawyers from the LSK, the Moi administration also imposed Value-Added Tax (VAT) on the legal profession, while exempting other professions from the measure. This increased the cost of legal services across the country, taking the profession out of reach for ordinary Kenyans. This had the effect of making the profession non-viable within the Kenyan market, which in turn was intended to whittle down the numbers of lawyers and ultimately the LSK membership.[289]

Furthermore, the Moi administration facilitated and deployed the pro-establishment faction to disrupt LSK activities. This was manifested in the activities of pro-establishment lawyers

[284] S. Kwayera, 'Africanise the Chief Justice', *Sunday Nation*, 7 July 1985, 6; P. Mwangi, 'How to break cartels in legal profession', *Daily Nation*, 16 February 2019, 17; Ghai, 'Profession'; Cockar, *Doings*, 114–131.
[285] Nowrojee, 'Profession', 36; Kegoro, Interview; Cox and Ojienda, 'Enforcement', 86.
[286] Nowrojee, 'Profession', 36.
[287] Kegoro, Interview.
[288] Nowrojee, 'Profession', 38.
[289] 'Pressure', *The Weekly Review*, 12.

who not only instituted suits against the LSK but also obtained court injunctions to prevent the organisation from issuing statements critical of the administration.[290] One of the most notable injunctions to this extent was *Aaron Ringera and Others vs LSK*, in which the plaintiffs moved to court to stop the LSK from issuing what they branded 'political statements.' The plaintiffs succeeded in obtaining an injunction which gagged the LSK from issuing statements which criticised government for violating the rule of law.[291] A second such case was *Kenneth Kiplagat vs LSK (No.2)*, in which the plaintiff sought to declare LSK statements against government conduct as not representative of his views as a member of the LSK and therefore in violation of the LSK Act. But this attempt failed, with the plaintiff's complaint being dismissed by Justices Joyce Aluoch and J. Ransley.[292]

With the interaction between the Moi administration and the LSK remaining one of hostility and mutual suspicion until the end of the administration, it resulted in at least two legacies in the country's legal history. First, although the Moi administration had seen the rise of the LSK as a vertical accountability actor, by repealing Section 2A of the 1963 Constitution, the administration inadvertently weakened the organisation. It did this by permitting political parties, and in doing so, transferred much of what had helped LSK build up a strong reputation as an alternative public voice to political parties. This left the organisation struggling for relevance in the aftermath of the re-introduction of political pluralism in the country.[293]

Secondly, the Moi administration presided over the emergence of both outstanding chairpersons of the organisations as well as public-spirited lawyers. Whereas the chairpersons helped in advancing the LSK as a vertical accountability actor under difficult circumstances, the public-spirited lawyers extended their activities out of the confines of their professional field to engage in other public-interest campaigns. The chairpersons included those who had transformed the organisation into a platform for restraining the state from excesses and used the LSK to advance the public agenda. One of the notable chairpersons, in this regard was G. B. M. Kariuki (1985-86), who denounced the light sentence the High Court had handed to a white soldier convicted of killing a Kenyan woman. At the time, the LSK hardly spoke against the racial injustice inherent in the country's legal system largely because of the legacy

[290] Nowrojee, 'Profession', 37.
[291] Ibid.
[292] Ibid.
[293] P. Mwangi, 'Lawyers too have a case to answer', *Daily Nation*, 9 February 2019, 17; K. Ngotho, 'Clout'.

of non-indigenous dominance of the organisation. By speaking against the legacy, Kariuki pushed the LSK into confronting its non-indigenous racial legacy.

Joe Okwach (1986–1987), who was Kariuki's immediate successor, also advanced LSK's vertical accountability credentials when he engaged in denouncing occasional abuse of power by administration functionaries. One such case involved the Rift Valley Provincial Commissioner when he forced the driver of a private car to give him a lift. By denouncing this act of abuse of power, Okwach set up the LSK as a platform for denouncing the practice under the Moi administration. It was a tactic that was picked up by subsequent LSK chairpersons such as Paul Muite (1990–1992) and Willy Mutunga (1993–1994) who used it to call out and institute legal proceedings against some of the abuses of power by administration functionaries.[294]

The public-spirited lawyers included Gitobu Imanyara, who apart from providing legal services also founded *The Nairobi Law Monthly* magazine, which became one of the most influential publications in demanding for political pluralism in the early 1990s. Imanyara served as Secretary General of Ford-Kenya, one of the major political parties to emerge with the re-introduction of political pluralism. He eventually became a parliamentarian and continued engaging in campaigns which promoted the rule of law besides providing legal services.[295] A second lawyer who emerged in this mould was Mutula Kilonzo, who served as LSK chairman before he became close to the Moi administration. Mutula served as the President's personal lawyer and was also a nominated KANU MP in the last five years of the Moi administration. He died in April 2013 while serving as the Secretary General of the Wiper Party, one of the political parties to emerge in the post-Moi era.[296]

A third public-spirited lawyer was Paul Muite, who presided over arguably the most activist phase of the LSK which engaged in pushing for reform of the country. He became chairman of the LSK in 1990 and was personally at the Kamukunji grounds for the first Saba Saba rally on 7 July 1990, which was violently dispersed by riot police. With introduction of political pluralism, Muite served as the Vice President of Ford Kenya. He entered Kenya's first parliament after the re-introduction of political pluralism but left Ford Kenya in 1993 to

[294] Kegoro, Interview.
[295] *Roll of Honour,* The Law Society of Kenya; 'Tracing fortunes of second liberation "Young Turks"', *Sunday Nation*, 10 September 2017, 19; M. Adhiambo 'Gitobu Imanyara on slapping the first lady, love for writing and missed fathering chances', *The Standard*, 5 May 2019, 22.
[296] J. Kamau, 'Kiplagat'; 'Moi nephew case marked a turning point in Mutula's life', *Sunday Nation*, 28 April 2013, 24.

found Safina along with Richard Leakey. Unfortunately, Muite was accused of taking a bribe from the main suspect in the Goldenberg Scandal in 1996, an accusation he denied. He unsuccessfully ran for presidency in 2013.[297]

A fourth public-spirited lawyer to emerge in the Moi era was James Orengo. Granted, his activism began way back when he was a student leader in the early 1970s, challenging the Jomo Kenyatta administration. He entered parliament as Ugenya MP as a result of a by-election in which he received the support of Jaramogi Oginga Odinga, who was himself banished from politics. Inside parliament, he was part of the 'Seven Bearded Sisters' that tried to uphold parliamentary independence against the Moi administration's dominance. For this, the government forced him into exile in Tanzania, from where he was repatriated in 1983 along with Chelagat Mutai, the 1976 Change-the-Constitution movement politician Kihika Kimani, and the 1982 coup plotters Hezekiah Ochuka and Pancras Okumu Oteyo, as part of an exchange of dissidents between the Moi administration in Kenya and the Mwalimu Julius Nyerere administration in Tanzania.[298] Orengo emerged again into public limelight during the early 1990s' campaign for political pluralism, where he led street demonstrations against the Moi administration. Upon re-introduction of political pluralism, Orengo entered parliament once again as MP for Ugenya under the Ford Kenya party.

Orengo was involved in different initiatives aimed at reform of the country between the 1997 and the 2002 elections. These included spearheading the Muungano wa Mageuzi pressure group that took to the streets to agitate for constitutional change. In the 2002 elections, he unsuccessfully vied for the presidency under the Social Democratic Party (SDP). He rejoined parliament through the Orange Democratic Movement (ODM) party in the disputed 2007 election and was made Minister for Lands under the Grand Coalition government. Under the 2010 constitution, he became Senator for Siaya County.[299]

In all, the Moi administration gave rise to at least three types of lawyers. The first lot consisted of pro-administration lawyers who had grown out of the administration's need to co-opt sections of the legal profession. The second lot consisted of liberal lawyers who fought for the freedoms the Moi administration had seriously suppressed, with a strong

[297] Gimode, 'Police'; 'Hon. Paul Muite', *Mentorship Web Series*; P. Mwangi, 'How to break cartels in legal profession', *Daily Nation,* 16 February 2019, 23; 'I gave Muite Sh20m – Pattni', *Daily Nation,* 9 December 1996, 1–2.
[298] Odinga and Elderkin, *Raila*, 117.
[299] D. Onjili, 'James Orengo: as contrary as he is iconic', *The Nairobi Law Monthly* 11, No. 3 (2019): 18–20; '"Young Turks"', *Sunday Nation*.

commitment to expansion of the democratic space and the liberal order. The third lot of lawyers formed the radical cohort, which, although it joined the liberal lawyers in fighting the Moi administration, it was ideologically committed to more than just liberal ideals. Each of these categories shaped the legal landscape of the country.

4.6 Summary

The Moi administration inherited an institutional terrain in which the three cardinal principles of the rule of law were either deliberately violated or ignored. In addition, vertical accountability institutions were heaving under a generally hostile environment set up by the Jomo administration. The Moi administration embraced this terrain without significant change. It not only exploited the decline in the rule of law institutions, but also repurposed the decline to suit its own purposes. But unlike the administration, the Moi administration had to contend with three emergent realities. First, there was a re-emergence of at least one checks and balances institution, the political opposition, which the Jomo administration had effectively muzzled. Secondly, within the vertical accountability terrain, the administration had to contend with not just the resurgence of the three vertical accountability actors, the church, the media and the labour movement which the Jomo administration had silenced, but also with a proliferation of actors who demanded for the administration's accountability. The new actors were the academia, underground dissident groups as well as musicians and artists. Thirdly, the administration had to contend with the emergence of external accountability as a major feature in the country's evolving rule of law terrain.

The administration responded to these developments using three main tactics. First, it inserted itself in each of these institutions and had sections of them serve its purposes. Secondly, it escalated the hostile environment instituted by the Jomo administration by introducing additional aspects to measures instituted under the Jomo administration, such as when it added torture to detention without trial. Thirdly, it evaded externally-driven accountability through adopting forms of the reforms demanded but not their substance.

In this environment, the LSK emerged as one of the most visible of the new actors in vertical accountability. Initially, the relationship between the LSK and the Moi administration started off on cordial terms. This was largely due to initiatives early in the administration's life which the LSK found friendly. In particular, three initiatives endeared the administration to the LSK. First, it released political detainees of the Jomo era. This indicated to the LSK the

new government's respect for some of the cardinal principles of the rule of law such as the respect for constitutionalism with its protection of individual rights. Secondly, the administration appointed at least two indigenous Kenyan lawyers as judges. This demonstrated to LSK the new government's commitment to Africanisation, which the organisation considered one of the most urgent policies for helping the judiciary to overcome the dominance of non-indigenous Kenyan professionals. Thirdly, the new government appointed James Karugu as AG to replace Njonjo. Karugu went on to cultivate a friendly relationship with LSK.

However, the initial cordiality between the Moi administration and the LSK fizzled out. At a general level, the hostile environment against the rule of law which the new administration inherited from the preceding Jomo administration was bound to cause a rift with the LSK. At a more internal level, the LSK had matured into an effective vertical accountability actor, having overcome the racial divisions which had limited its ability to focus on the general rule of law environment in the Jomo era. This maturity meant that it started recognising violations of the rule of law which it could not be silent about. Secondly, the Moi administration intensified the repressive measures inherited from the Jomo era as a way of maintaining its stranglehold on power. In doing so, it violated all the three cardinal principles of law, and this compelled the LSK to oppose it on this account.

In responding to curb the LSK's ability to restrain it, the Moi administration applied measures similar to what it had applied to other mechanisms of state restraint. These were mainly two, consisting of, on the one hand, co-optation of sections of the organisation. On the other hand, it deepened the hostile environment for the section of the LSK which remained critical of it. This further escalated the hostility between the administration and the LSK, leading to the LSK openly joining the political opposition to remove the administration from power. This was so successful that the LSK was prominently represented in the government that replaced the Moi administration after the 2002 election.

The relationship between the Moi administration and the LSK left behind a legacy constituted by two main features. The first feature consisted of public-spirited lawyers who went on to play a dominant role in the country's politics and governance, outside of the LSK. They occupied positions of significant influence in the post-Moi governance of Kenya, prominent among them being Willy Mutunga, who went on to serve as the country's Chief Justice. Many other members went on to serve as members of parliament.

Secondly, with the reintroduction of political parties, the role of being an opposition platform which the LSK had played prior to re-introduction of political pluralism was significantly diminished. This forced the LSK to revert to being a professional body for lawyers, a situation which made it less visible in the country's governance. This is how the LSK walked into the next administration, the National Rainbow Coalition (NARC) government led by Mwai Kibaki.

CHAPTER FIVE

LSK IN THE KIBAKI ERA, 2002–2013

5.1 Overview

This chapter's objective is to examine the interaction between the LSK and the Mwai Kibaki administration. It commences with the interrogation of rule of law under the Kibaki administration and an examination of how the administration related with both checks and balances and vertical accountability institutions. This provides the general rule of law background in which the LSK operated. The chapter then explores how the LSK attempted to restrain the administration from excesses within this background, establishing how the organisation was able to manoeuvre around the terrain laid out for rule of law institutions in the country. It concludes by indicating the reaction of the Kibaki administration towards LSK's attempts at restraining it.

5.2 Kibaki Administration and the Rule of Law

There were three dimensions to the Kibaki administration and its relationship with the rule of law in Kenya. The first dimension involved the rule of law heritage which the administration had inherited from the preceding Moi administration. The institutions inherited under this dimension included conventional checks and balances institutions such as the heavily amended 1963 Independence Constitution, the judiciary, a multi-party parliament, competitive elections, a political opposition and the office of the Auditor-General, which had been renamed the Kenya National Audit Office (KENAO). It also included a small but expanding set of new institutions such as the Kenya National Commission on Human Rights (KNCHR) and the Kenya Corruption Control Authority (KCCA) which emerged towards the end of the preceding Moi administration due to pressure from external and vertical accountability actors.[1]

The second dimension consisted of the rule of law regime which emerged in the aftermath of the 2008 Post-Election Violence (PEV). The most important institution which emerged under this dimension was the Grand Coalition Government (GCG), in which the Kibaki

[1] R. Muhula and S. Ndegwa, 'Instrumentalism and Constitution-making in Kenya: Triumphs, Challenges and Opportunities beyond the 2013 Elections', in *Kenya: The Struggle for a New Constitutional Order*, 85–87; W. Mitula, M. Odhiambo and O. Ambani, *Kenya's Democratisation: Gains or Loses? Appraising the Post-KANU State of Affairs*, (Nairobi: Claripress Ltd, 2005), 18–22.

administration shared executive power with the political opposition, led by Raila Odinga, who became Prime Minister. Other institutions within this dimension included institutions set up to recover from the conflict, chief among them the Truth, Justice and Reconciliation Commission (TJRC) and the Committee of Experts on Constitutional Reforms (CoE).

The third dimension emerged with the constitutional changes which arose out of the new 2010 Constitution. It consisted of the new institutions which rose from the new Constitution once it was passed. These included the 2010 Constitution itself, the new judiciary, the new AG and the new Ombudsman among many other institutions. Each of the three dimensions carried prospects and challenges for the three cardinal principles of the rule of law.

Kibaki Administration and the Rule of Law prior to the 2007 Post-Election Dispute

Under the first dimension of the Kibaki administration, the cardinal principles of the rule of law witnessed early advances. The administration instituted at least four key initiatives aimed at addressing the impunity which had been witnessed under the preceding Moi administration. First, it set up a Commission of Inquiry into the Goldenberg Scandal, chaired by High Court judge Justice Samuel Bosire. Secondly, it strengthened the anti-corruption statutes which had been abandoned and frustrated by the preceding administration. Thirdly, the administration made attempts to reclaim public assets that had been taken by powerful personalities under the Moi administration. An important initiative in this direction was the repossession of the KICC, which had been converted into party headquarters by KANU, although this was done in disregard of an active court order. Fourth, the new administration set up a Commission of Inquiry into the illegal/irregular allocation of public land, which was chaired by lawyer Paul Ndung'u and which was popularly known by its chairperson's surname name. In its final report released in 2004, the Commission provided details of public land which had been lost to senior figures in past administrations. The land had been grabbed from important public utilities including protected forests, water catchment areas, public recreational spaces, road reserves, public institutions and agricultural experimental grounds.[2]

[2] Awori, *Tiger*, 275–284; also 306–324; Gathii, 'Anti-Corruption Strategy in Kenya', *Connecticut Journal of International Law*, 435–449; Gathii, 'Agenda', *Development Review,* 29–32; Kibwana, Wanjala and Owiti, *Corruption*, 60; Murunga, 'Adjustment', 288–290; Odinga and Elderkin, *Raila*, 199; N. Gisesa, 'Plotting the Moi succession: Intrigue, betrayal and tears', *Sunday Nation*, 13 October 2019, 19; Kanyinga, 'Dismally'; K. Ngotho, 'Schemes'; Maina, *State Capture,* 17–24; Sigei, 'Mau'; Sigei, 'Conservationist'; K. Ngotho, 'The day Uhuru was thrown out of government building', *Sunday Nation*, 13 September 2020, 18; J. Kamau, 'Demolitions'; A.M. Ndung'u, 'The State of the Judiciary and the Rule of Law since 2002', *The Rule of Law Report* (2005): 9.

However, these early efforts aimed at addressing the impunity of the past administrations and to restore the rule of law were soon abandoned. A pattern emerged under the Kibaki administration in which commissions of inquiry were set up to investigate past acts of impunity, but whose recommendations were never implemented. This was the case with the three commissions of inquiry into the Goldenberg Scandal, the illegal/irregular allocations of public land. Although each of the two commissions came up with recommendations aimed at restitution to victims of impunity, the Kibaki administration did not implement them.[3]

Due to the administration's inability to deal with high level acts of impunity in past administrations, other efforts at fighting impunity began to falter as well. This became the case especially in efforts to fight corruption. The administration's anti-corruption initiatives failed due to challenges largely emanating from the KCCA's weak constitutional basis. The agency was slapped with numerous litigations which obstructed its activities. It was also the basis of a conflict between the new administration and parliament due to the administration's extension of Justice Aaron Ringera's tenure as the agency's director. Justice Ringera had been the KCCA director since 1999 and served till 2009, when parliament rejected the new administration's attempt to extend his term, leading to his exit and replacement by lawyer P. L. O. Lumumba.[4]

Having abandoned the path of dealing with past acts of impunity, the Kibaki administration engaged in its own excesses which violated the rule of law. These excesses ranged from corruption to suspected involvement in controversial deaths of high-profile individuals.[5] The most high-profile case of corruption under the Kibaki administration was the 2004 Anglo Leasing scandal. The scandal was initially unearthed by Ntonyiri MP Maoka Maore in April 2004 and led to investigations by both parliament and the Kibaki administration's Permanent Secretary (PS) for Governance and Ethics John Githongo. The investigations hinted at the involvement of high-profile Kibaki government officials in the scandal. It involved 18 security-related contracts collectively worth Kshs. 55 billion meant to supply forensic

[3] Akech, 'Abuse', 380–383; K. Makokha, 'Interview with Kamlesh Pattni, *On the Spot*, NTV, YouTube video, 10 March 2019, 50:32, https://www.youtube.com/watch?v=wGPQczO4siU; 'Moi ordered Ouko killed, inquiry told', *Daily Nation*, 5 March 2005, 2; Africa Centre for Open Governance, *Postponing the Truth: How Commissions of Inquiry are used to circumvent justice in Kenya* (Nairobi: Africa Centre for Open Governance [AfriCog], 2008); Akech 'Abuse', 381-383; Maina, *State Capture*, 17.

[4] Gathii, 'Anti-Corruption Agenda', *Development Review*, 52–62; J. Kamau, 'KPCU'; J. Kamau, 'When rats "ate" pyrethrin worth Sh2.4bn, and other shameful tales', *Daily Nation*, 4 August 2020, 30.

[5] K. Nyaundi, 'Review of the performance of National Rainbow Coalition in Government', *The Rule of Law Report* (2005): 23–31; Forole. 'Crusade', *American University International Law Review*, 61–68.

facilities, security equipment and support services for various security agencies in the country.[6]

In its reaction to the scandal, the administration attempted to stop investigations led by the KCCA and the Governance and Ethics PS as well as by UK's Serious Fraud Office and authorities in Switzerland. The authorities then indicated that those behind the scandal had offered to return the money they had misappropriated. However, this was contradicted by the fact that the administration continued to make payments to the companies involved in the scandal. Eventually, between November 2005 and February 2006, the administration sacked at least two ministers who had been adversely mentioned in the scandal. It also made moves at prosecuting a few of the suspects.[7]

Besides the Anglo Leasing scandal, there were other cases of corruption under the administration. These included the 2004 maize scandal involving importation of maize into the country, but which eventually led to loss of the National Cereals and Produce Board (NCPB) assets, the 2005 attempt to revive the Kenya Railways, which lost the country up to Kshs. 31 billion in a failed railway revival scheme, and the 2008 Triton petroleum scandal in which the public lost up to Kshs. 7.6 billion for non-supply of petroleum products.[8] Other cases of corruption included the Kenya Medical Research Institute (KEMRI) scandal in which the public lost Kshs. 19.3 million, which was allegedly swindled by the institute's director; the Kenya Pipeline Corporation scandal in which Kshs. 1.25 billion was fraudulently transferred to a third party in 2010; the Nairobi cemetery land scandal in which Kshs. 260 million meant to purchase new cemetery grounds for the larger Nairobi region was swindled; the 2010 World Bank Education funds scandal in which Kshs. 14m was lost due to misappropriation by senior Ministry of Education officials; and the NSSF scandal in which Kshs. 1.6 billion was lost through irregular trading of shares between 2004 and 2007.[9]

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[6] Maina, *State Capture*, 18–23.
[7] Awori, *Tiger*, 331–337; Odinga and Elderkin, *Raila*, 292–298; Maina, *State Capture*, 18–23; Gisesa, 'Security Honchos'.
[8] Lower, 'Unshakeable Elites', 17; J. Kamau, 'Whistleblower or king of sleaze? Jacob Juma exposed', *Daily Nation*, 28 June 2020, 29; J. Kamau, 'NCPB, a citadel of corruption: How Sh297m vanished', *Daily Nation*, 8 July 2020, 30; J. Kamau, 'Briefcase businessman who took over Railways without paying a cent', *Daily Nation*, 26 July 2020, 30.
[9] N. Gisesa, 'Mischief in big fish corruption trials', *Sunday Nation*, 17 November 2019, 32; Africa Centre for Open Governance, *Kenya Governance Report* 2011 (Nairobi: African Centre for Open Governance, 2011); V. Achuka, 'Crashing oil prices laid bare Devani's devious schemes', *Daily Nation*, 19 February 2021, 29; V. Achuka, 'How Sh9bn oil scandal was planned and executed', *Daily Nation*, 15 February 2021, 23; D. Mwere,

Besides corruption, the other acts of violation of the rule of law which the Kibaki administration presided over included suspected involvement in controversial deaths of public figures. Among these were the deaths of university lecturer Chrispine Odhiambo Mbai in September 2003; human rights activists Oscar Kang'ara and John P. Oulu in March 2009; and Muslim cleric Aboud Rogo in July 2012.[10] A TJRC report revealed that Mbai was killed due to his political views on devolution, while Kang'ara and Oulu were killed by suspected security agents due to the work the duo was doing in highlighting the crackdown on the suspected adherents of the Mungiki sect by police officers. Rogo's death was suspected to have been caused by his suspected links with the Somalia-based Al Shabaab terrorist group.[11] In addition, the Anglo Leasing scandal whistle blower John Githongo fled to exile in the UK, which indicated signs of intolerance in the Kibaki administration.[12]

In its first term, therefore, the Kibaki administration largely failed to reform the country's governance. The administration retained the Cabinet as the most powerful decision-making organ in government. However, the Cabinet was divided almost immediately after its formation, with two factions emerging from the two parties which had merged to form the National Rainbow Coalition (NARC) party through which the Kibaki administration had successfully contested for power. They consisted of a Liberal Democratic Party of Kenya (LDP) faction led by Raila Odinga, and the National Alliance Party of Kenya (NAK) wing led by Mwai Kibaki.[13]

The Kibaki administration also retained the Moi-era AG Amos Wako. The AG became an important player in the administration's agenda on the rule of law institutions, just as he had been under the Moi administration. The administration also maintained direct control of security sector institutions in much the same way as the previous Moi administration. Due to

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'When Kimunya was dragged into potato plant wars', *Daily Nation*, 3 September 2020, 27; K. Ngotho, 'Schemes'.

[10] Odinga and Elderkin, *Raila*, 285; Mitula, Odhiambo and Ambani, *Post-KANU*, 22–26.

[11] Department of State, Government of the United States of America, *Country Reports on Human Rights Practices for 2008: Kenya*, Government of the United States of America, 2009; Odinga and Elderkin, *Raila*, 384–385; N. Komu, 'Villages in central Kenya still dread return of Mungiki', *Daily Nation*, 26 August 2020, 24; N. Gisesa and M. Chelangat, 'Unsolved murders: High profile cases yet to be closed', *Daily Nation*, 27 September 2019, 18; M. Ahmed, 'Aboud Rogo's followers unleash terror in Mozambique', *Daily Nation*, 4 September 2020, 9.

[12] Maina, *State Capture*, 18–23.

[13] G. Ndung'u, 'How referendum changed political landscape', *Daily Nation*, 24 August 2020, 24; N. Gisesa, 'Sally Kosgei: The manner of my sacking was meant to humiliate me', *Sunday Nation*, 13 October 2019, 22.

this control, the Kibaki administration was accused of deploying the institutions in partisan agendas, such as planting into the institutions impostors who compromised their integrity.[14]

The Constitution under the Kibaki Administration prior to the 2007 Post-Election Dispute

The independence Constitution was among the checks and balances institutions the Kibaki administration inherited from the preceding Moi administration. However, the Constitution had been amended by both the Jomo and Moi administrations and reflected a massive concentration of power in the executive. The Kibaki administration faced immense pressure to replace it with a new one, with calls for its replacement preceding the new administration, and lasting the entire duration of the Moi administration after the re-introduction of political pluralism in 1991. During campaigns in the lead up to the 2002 general election, the NARC party had promised to enact a new constitution within one hundred days of its ascendancy to power. The party promised to finalise the CKRC process led by Yash Pal Ghai, which had been frustrated and ultimately halted towards the end of the Moi administration.

Once in power, the Kibaki administration reconvened the CKRC process at the Bomas of Kenya in Nairobi. However, significant differences emerged soon after the process restarted. The differences were over the structure of government and mirrored similar divisions within the new ruling NARC party along coalition-partner lines. Whereas the LDP faction pushed for a parliamentary system, the NAK faction insisted on a strong presidential system. Towards the conclusion of the CRKC process, the NAK wing walked out of the proceedings, protesting that by introducing a parliamentary system, the process was creating two centres of power.[15]

When the Kibaki administration received the final draft constitution agreed to by delegates of the CKRC process at the Bomas of Kenya, it introduced into the draft significant changes that largely retained the highly-contested presidential powers, and which the CKRC draft had

[14] Menya, 'Wako'; Some and Githae, 'Dignified'; J. Openda, 'I'm still a police officer, declares Waiganjo', *Daily Nation*, 27 June 2020, 23; J. Openda, 'DPP appeals acquittal of police impostor Joshua Waiganjo', *Daily Nation*, 29 June 2020, 29; 'Artur brothers deported after gun drama at airport', *Daily Nation*, 10 June 2006, 3; T. Omulo, 'Court to Hear Artur Margaryan Case against Raila Odinga', *Citizen Digital*, 26 February 2015, https://www.citizen.digital/news/court-to-hear-artur-margaryan-case-against-raila-odinga-70368 (accessed 3 October 2020); M. Ali and D. Onsarigo, 'Revealed: The secrets of the Artur brothers', *The Standard*, 26 May 2012, 14.

[15] Gitari, *Troubled*, 282–282; Y.P. Ghai and J.C. Ghai, 'Constitutional Transitions and Territorial Cleavages: The Kenyan Case', *Occasional Papers Series*, No. 32 (2019): 9–10; Odinga and Elderkin, *Raila*, 274–279; Kituku, *Doomed*, 11–15; M. D. Mude, *Fighting for Bomas: In Search of the Kenya I want* (Nairobi: Mvule Africa Publishers, 2009), 24; Chitere (et al), 'Documents', 3–4; Awori, *Tiger*, 257–266.

heavily reduced. To spearhead these changes, it appointed a committee led by AG Amos Wako and replaced Ghai with lawyer Abida Aroni as the new CKRC chairperson. The new Wako-led committee came up with a revised draft of the constitution, which was popularly referred to as the Kilifi draft.[16] The Kilifi draft constitution was subjected to a public referendum in 2005. Amidst undertones of ethnicity, a majority of Kenyan voters rejected the proposed draft with the official tally as announced by ECK chairman Samuel Kivuitu indicating that the opposing side garnered a total 3,548,472 (57%) of the votes, while the proposing side received 2,532,918 (43%).[17] With the rejection of the draft constitution, the Kibaki administration reverted to the old heavily amended independence Constitution in running the country. The opposing side on the other hand indicated that they would continue their agitation for a new constitution for the country.[18]

Checks and Balances under the Kibaki Administration prior to the 2007 Post-Election Dispute

Under the first dimension of the Kibaki tenure, the only principle of the rule of law which witnessed significant progress was the separation of powers, in which there emerged strong checks and balances tendencies in a number of institutions, including parliament, the political opposition and to some extent, the judiciary. These institutions were themselves in a state of flux due to a decade's long internal agitation and external pressure for change.

Parliament

Parliament was perhaps the most assertive of all the checks and balances institutions which the Kibaki administration inherited from the Moi administration. The institution had advanced its independence from the executive over the period between the re-introduction of political pluralism in 1992 and the end of the Moi administration in 2002.[19] The independence and assertiveness were manifested in a number of oversight initiatives which parliament undertook without reference to the executive, as had been the case under the

[16] G. R. Murunga and S. W. Nasong'o (eds), *Kenya: The Struggle for Democracy* (London and New York: CODESRIA Books, 2007), 10; Chitere (et al), 'Documents', 4; D. Mugonyi and T. Kago, 'Abida replaces Ghai as review team boss', *Daily Nation*, 8 July 2004, 1.
[17] Mude, *Bomas*, 7–21.
[18] Awori, *Tiger*, 337–340; Mude, *Bomas*, 25–27; O. Obonyo, 'Intrigues behind fall of Bomas Draft, steps to Second Republic', *Daily Nation*, 25 August 2020, 28; Y. P. Ghai, 'History of Bomas Constitution: A sad story', *Daily Nation*, 19 September 2020, 26; Y. P. Ghai, 'Why the Bomas draft is the best constitution we never had', *Daily Nation*, 22 August 2020, 27; G. Ndung'u, 'How referendum changed political landscape', *Daily Nation*, 24 August 2020, 29.
[19] Awori, *Tiger*, 330; Mitula, Odhiambo and Ambani, *Post-KANU*, 73–77.

preceding Moi and Jomo administrations. There were at least three initiatives of this nature. The first was the formation of a parliamentary select committee in early 2003 to inquire into the assassination of former Foreign Affairs Minister, Robert John Ouko in February 1990.[20]

A second initiative through which parliament asserted its independence from the Kibaki administration was in investigating a duo of foreigners visiting the country which the media dubbed 'the Artur Brothers.' The duo had engaged in rogue activities touching on the country's security. Through a joint committee chaired by Paul Muite and Ramadhan Kajembe, parliament established that the duo had come to the country through sponsorship by powerful government officials and politically-connected individuals.[21]

A third initiative which parliament enacted independent of the executive during the Kibaki era involved the investigation into the Anglo Leasing scandal. In reacting to the scandal, parliament's Public Investments Committee (PIC) led investigations into the scandal, including travelling to the UK to interrogate former Governance and Ethics PS John Githongo who had fled to exile after blowing the whistle on the scandal. Secondly, it put pressure on the administration to sack and prosecute the named suspects, most of whom were senior officials in the administration.[22]

The Political Opposition

The political opposition, just like parliament, had grown in strength since the re-introduction of political pluralism in 1992. As such, the Kibaki administration had to contend with a more forceful opposition compared to the preceding administrations. In fact, the administration itself had risen from the ranks of the political opposition before it ascended to power. Upon ascending to power, the administration had to contend with an opposition made up of the former ruling party KANU and the LDP faction of the new ruling NARC party, which disagreed with the Kibaki administration over issues such as sharing of positions in government and the direction of the then on-going constitution review process.

However, unlike the Jomo and Moi administrations which had an elaborate array of mechanisms with which to silence the opposition, the Kibaki administration had limited options with which to do so. Whereas the previous administrations had employed regular

[20] 'Probe told of Moi visits to Oyugi home', *Daily Nation*, 16 October 2004, 6.
[21] Ali and Onsarigo, 'Artur brothers'.
[22] Maina, *State Capture*, 18–23.

physical violence against the opposition, there were only a few incidences of deploying physical violence against the opposition in the Kibaki era. One such incident involved physically blocking KANU MP Gideon Moi from holding a public rally in his Baringo Central Constituency in July 2003.[23]

Nonetheless, borrowing an old habit from the Jomo and Moi administrations, the Kibaki administration also tried to weaken the opposition by co-opting MPs from opposition parties. This begun in June 2004, but intensified after the 2005 referendum, when members of the LDP wing of the ruling NARC party were sacked from government. To bolster its support in parliament, the Kibaki administration replaced the sacked LDP Cabinet members with MPs from the opposition KANU and FORD People parties, thus gaining the support of the rest of these parties' MPs.[24]

Overall, however, the administration's means of responding to the opposition were reduced to mostly a propaganda war against the opposition. This was seen, for instance, in the propaganda war that the administration ignited over the scandal surrounding the presence of the so-called Artur brothers in the country. It accused the opposition of having brought the controversial duo into the country to cause security and political havoc.[25]

The Judiciary

Upon ascending to power, the Kibaki administration set up a Judicial Commission headed by Justice Aaron Ringera, whose task was to undertake a so-called radical surgery of the judiciary. The purpose of the commission was to rid the judiciary of officials suspected of unprofessional conduct. The Commission listed a number of judges suspected of having engaged in professional misconduct. The listed judges were expected to either resign or face a tribunal headed by retired Chief Justice Abdul Majid Cockar to defend themselves from accusations levelled against them. The biggest casualty of the process was Bernard Chunga, the last Moi-era Chief Justice, who opted to resign in February 2003 rather than face the Cockar-led tribunal.[26]

[23] Mitula, Odhiambo and Ambani, *Post-KANU*, 32–33.
[24] A. Kamunde, 'The Legality of the Government of National Unity and its impact on Democracy, Governance and the Rule of Law', *The Rule of Law Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, 2005), 37–47.
[25] Ali and Onsarigo, 'Artur brothers'.
[26] Cockar, *Doings*, 197; Odinga and Elderkin, *Raila*, 295; Oseko, 'Reform', 161–165; Mbondenyi, 'Unclogging', 330–332; C. A. Khamala, 'Kenyan Incremental Judicial Reforms', *Pambazuka News*, 3 August

The ‘radical surgery’ had little effect in transforming the judiciary and making it fully independent of executive interference. The replacement of Chunga with Evans Gicheru as the new administration’s Chief Justice was faulted as unconstitutional by critics. The ‘radical surgery’ itself was faulted for having been riddled with many inconsistencies, including ethnic favouritism and making unsubstantiated claims against judges.[27] It also led to unilateral appointments of 29 judges by September 2003 to replace those who had been dismissed from the judiciary.[28] Furthermore, there continued to be instances of executive interference in judicial matters even in the wake of the ‘surgery.’ An example of this was a case in 2007 when a stand-off between the Vice President Moody Awori and a magistrate in the Vice President’s Busia district over a case involving two of the Vice President’s constituents forced parliament to intervene in defence of the magistrate.[29] Senior members of the administration also routinely defied court orders, with the most notorious being Ministers Raphael Tuju, Karisa Maitha, William Ntimama and Ali Mwakwere.[30]

Anti-Corruption Institutions under the Kibaki Administration

An important institutional heritage bequeathed to the Kibaki administration was the KCCA. The Commission had been one of the institutional products which emerged out of pressure on the Moi administration by external accountability actors, particularly the World Bank and the IMF. The actors had insisted on the formation of the institution as a way of reducing corruption and wastage in the Moi administration. Once in power, the Kibaki administration embarked on an elaborate redesign of the legal and institutional anti-corruption architecture in the country. It did this by taking at least three measures. The first measure targeted changes to the anti-corruption legislation. The administration dropped the Corruption Control Act (CCA) of 2001 which the Moi administration had enacted towards the end of its tenure, perceiving it as less effective in tackling the vice.

2009, https://africanarguments.org/2009/08/incremental-judicial-reforms-in-kenya/, (accessed 11 October 2021); Akech ‘Abuse’.

[27] ’Clean-up of the Judiciary Failed, says Ex-judge Daniel Aganyanya’, *Daily Nation*, 26 August 2014, 9; D. Luvega, ‘Former Judge Daniel Aganyanya Suffers Heart Attack’, *Daily Nation*, 17 January 2020, 29; F. Ontomwa, ‘Aganyanya Took a Path Few Dared Take’, *Daily Nation*, 20 January 2020, 32.

[28] Mitula, Odhiambo and Ambani, *Post-KANU*, 36; K. Muthoni, ‘Judiciary “Radical Surgery” Haunts Ringera in Chief Justice Interview’, *The Standard*, 7 September 2016, 3.

[29] Awori, *Tiger*, 342–345.

[30] A. M. Ndung’u, ‘The State of the Judiciary and the Rule of Law since 2002’, *The Rule of Law Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, 2005), 3–20; Mitula, Odhiambo and Ambani, *Post-KANU*, 51–53.

In the place of the CCA, the administration set up several interrelated anti-corruption legislations. Among these were the Anti-Corruption and Economic Crimes Act (ACECA) and the Public Officer Ethics (POEA) Act, all in May 2003. Whereas the ACECA sought to have a new Kenya Anti-Corruption Commission (KACC) replace the KCCA with broadened powers of fighting corruption, the POEA on the other hand established a code of conduct for public officials and a requirement that public officials declare their wealth. Other statutes enacted along with the two laws were the Public Service Commission Regulations of 2005 and the Public Procurement and Disposal Act (PPDA) of 2005.[31]

The second measure in strengthening the fight against corruption under the Kibaki administration targeted the institutional set up necessary for the fight. It created the Ministry of Justice and Constitutional Affairs and a specially-tailored Office of Ethics and Governance within the Office of the President. Both institutions were expected to provide the institutional home for the anti-corruption initiatives.[32] Thirdly, the administration, especially in its early days, provided the necessary good will to the anti-corruption efforts, leading to early successes against corruption. Notable among these efforts were recovery of some of the stolen public assets such as the KICC.[33] An important difference between the new administration and the preceding Moi administration was the former's discouragement of harambees, which had been one of the major drivers of corruption among politicians and government officials. Instead of harambees, the Kibaki administration instituted the Constituency Development Fund (CDF), which helped to reduce popular demand for harambees from public officials.[34]

As part of re-designing the anti-corruption architecture, the Kibaki administration appointed new directors into the KACC soon after ascending into power. The directors were first ratified by both the Anti-Corruption Advisory Board chaired by LSK chairperson Ahmednassir Abdullahi and parliament prior to their appointment. They included Aaron Ringera as head of the KACC, with Fatuma Sichale, John Mutonyi and Smokin Wanjala as his three assistants. However, the administration rejected the nomination of a fourth assistant director, one Julius Rotich. It cited concerns over Rotich's integrity and lack of adequate

[31] Forole. 'Crusade', *American University International Law Review*, 42; Akech, 'Abuse', 358.
[32] Akech, 'Abuse', 358.
[33] Gathii, 'Anti-Corruption Agenda', *Development Review,* 35–52.
[34] P. Mwangi, 'Success of Kenya's anti-graft war is in asset recovery', *Daily Nation*, 20 April 2019, 19; K. Ngotho, 'DP Ruto's Hustler Nation vs JM's Maskini Movement', *Sunday Nation*, 25 October 2020, 29; K. Ngotho, 'Harambee'.

qualification. The administration stated that it had raised these concerns with the Ahmednassir-led Advisory Board, but that the concerns had been ignored. The development led to one of the first confrontations between the Kibaki administration and the checks and balances institutions.

In reaction to the administration's rejection of Rotich's appointment, LSK chairperson Ahmednassir pulled the organisation out of the Advisory Board, citing executive interference in the workings of the Board. Besides LSK, at least one assistant minister resigned from the administration, apparently in protest against the administration's rejection of Rotich's nomination.[35] Ringera went on to serve as the Executive Director of the KACC until 2009 when he resigned along with Sichale and Wanjala under parliamentary pressure. He was replaced by lawyer P. L. O. Lumumba, who commenced work in September 2010. Lumumba's tenure on the other hand came to an end in 2011, when the KACC was disbanded and replaced by the EACC following the enactment of the EACC Act of that year.[36]

The Electoral Management System under the Kibaki Administration prior to the 2007 Electoral Dispute

A final important checks and balances arrangement which the Kibaki administration inherited from the Moi administration was elections. The 2002 election which ushered the Kibaki administration into power and which was hailed as the freest and most transparent in Kenya's history was undertaken under the leadership of KANU. The reason for the transparent election was largely attributed to the IPPG arrangement spearheaded by parliament. The arrangement provided for balance in representation of both government and the opposition sides in the Electoral Commission of Kenya (ECK), making the body more legitimate across the political divide.

The first election to be managed under the Kibaki administration was in 2007. Unlike most other checks and balances institutions inherited from the Moi administration, the electoral management system remained one of the few institutions over which the Kibaki administration retained significant influence. The influence sprang from the heavily amended 1963 Independence Constitution, which gave the incumbent government exclusive powers in

[35] 'Now minister quits as storm rages on Rotich', *Daily Nation*, 15 September 2004, 2.
[36] F. O., L. W. Okiri and J. O. Wandayi, 'Strengthening Integrity & Preventing Corruption in the Judiciary in Kenya', *Beijing Law Review,* 10, 131–152. https://doi.org/10.4236/blr.2019.101008.

constituting the ECK. Exploiting the exclusive power, it enjoyed in constituting the electoral body, the Kibaki administration went ahead to skew the arrangements for the 2007 elections in its favour in two main ways.[37] First, the administration unilaterally appointed commissioners into the ECK. In doing so, it reduced the representation of the opposition in the Commission. This was against the spirit of the IPPG arrangement.[38] Secondly, the administration deployed administration police officers as polling agents in opposition strongholds.[39] On a positive note, the administration encouraged the growth of opinion polling by private polling firms, which resulted in increased transparency in the electoral process.[40]

The administration's measures in skewing the electoral process in its favour resulted in at least two significant consequences. First, the deployment of administration police officers as polling agents led to early skirmishes between the officers and opposition supporters in opposition strongholds.[41] More significantly, the ECK mismanaged the 2007 presidential election, leading to an inconclusive outcome.[42] Although the Commission announced President Kibaki, the Party of National Unity (PNU) candidate as the eventual winner of the presidential election, this was strongly disputed by Raila Odinga, the Orange Democratic Movement (ODM) candidate.[43]

The Kibaki Administration after the 2007 Post-Election Crisis

The disputed electoral outcome led to post-election violence in which more than 1,000 Kenyans were killed.[44] The violence and general breakdown of law and order attracted international mediation.[45] A key product from the mediation was the National Dialogue and Reconciliation Agreement (National Accord) which was signed by both PNU and ODM. It provided four agenda items which formed the basis of pulling the country out of the post-

[37] S. Mukaindo, 'The Legal and Institutional Framework for the Management of Elections in Kenya', in *Discourses on Kenya's 2007 General Elections: Perspectives and Prospects for a Democratic Society* ed. Okoth Okombo (Nairobi: CLARION, 2009), 22–34; J. Onyando, *Kenya: The Failed Quest for Electoral Justice* (Nairobi: Free Press Publishers Limited), 2018, 27–28.
[38] Awori, *Tiger*, 340–342; Odinga and Elderkin, *Raila*, 290–308.
[39] Odinga and Elderkin, *Raila*, 308.
[40] Some and Githae, 'Dignified'; J. Kamau, 'Polls'.
[41] Odinga and Elderkin, *Raila,* 308; Akech, 'Abuse', 351.
[42] Odinga and Elderkin, *Raila*, 318.
[43] Some and Githae, 'Dignified'; J. Sigei, 'Kiraitu Murungi: Why we swore in President Kibaki at nightfall in 2007', *Sunday Nation,* 11 July 2021, 29; J. Kamau, 'Chebukati'.
[44] Odinga and Elderkin, *Raila*, 308–330; Awori, *Tiger*, 353–355.
[45] J. Kahongeh, 'How Tutu's arrival in Nairobi unlocked '07 poll row standoff', *Daily Nation*, 27 December 2021, 23.

election crisis and putting it on a path of reform.[46] These consisted of Agenda 1, which focused on the restoration of fundamental rights and freedoms and immediate end to violence; Agenda 2, which dealt with the humanitarian situation and aimed at promoting healing, reconciliation and restoration; Agenda 3, which sought to solve the immediate political crisis; and Agenda 4, which focused on long term measures involving constitutional, institutional, land and legal reforms.[47]

The four agenda items of the National Accord collectively ushered in the second dimension to the Kibaki administration's engagement with the rule of law in the country. Each agenda item provided for specific institutions and processes that had a major implication on the rule of law in the country. Under the first agenda item focused on ending violence, two commissions were set up to establish the truth behind the controversial election and the perpetrators of the violence. These were the Commission of Inquiry into the 2007 Election, chaired by South African judge Johann Kriegler[48] and the Commission of Inquiry on Post-Election Violence (CIPEV), chaired by Justice Philip Waki of the Kenya High Court.[49] The second agenda item which focused on responding to the humanitarian crisis and promoting reconciliation led to the formation of the TJRC whose mandate was to investigate both contemporary and past injustices that had caused deep-seated divisions amongst Kenyans. The third agenda item led to the formation of the Grand Coalition Government in its response to ending the immediate political crisis. Under the arrangement, executive power was shared between the presidency and a newly created position of prime minister, which was occupied by the 2007 election's main opposition candidate, Raila Odinga.[50]

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[46] N. Cheeseman, 'The Kenyan Elections of 2007: An Introduction', *Journal of Eastern African Studies*, 2:2, 2008, pp. 166-184, DOI: 10.1080/17531050802058286.

[47] Odinga and Elderkin, *Raila*, 353–359; M. K. Mbondenyi, 'An introductory appraisal', in *Human Rights and Democratic Governance in post-2007 Kenya: A post-2007 Appraisal*, 1; K. Ngotho, 'Instigators'; J. Wanga, '2007 Post-poll chaos that bred peace, delivered reforms', *Daily Nation*, 25 August 2020, 23.

[48] *Kriegler and Waki Reports – Summarised Edition*, Dialogue Africa Foundation (Nairobi: Dialogue Africa Foundation, 2009), 1–44; M. Mbaru, 'The Independent Review Commission on the 2007 Elections: Its Impact on Institutional Reform, in Kenya's Return to the Rule of Law', *The Rule of Law Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, 2008), 2–22; Maina, *State Capture*, 28.

[49] M. M. Nderitu, 'The Commission of Inquiry into the Post-Election Violence as a Transitional Justice Mechanism, in Kenya's Return to the Rule of Law', *The Rule of Law Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, 2005), 24–51; *Kriegler and Waki Reports*, Dialogue Africa Foundation, 47-74; Odinga and Elderkin, *Raila*, 363–364; S. Snow, 'Unhindered by the rule of law', *South African Journal of International Affairs*, 10–14.

[50] Odinga and Elderkin, *Raila*, 366–391.

It was the fourth agenda item which led to the enactment of the Constitution of Kenya Review Act (CKRA) of 2008. The passage of the law paved the way for the formation of the Committee of Expert (CoE), chaired by former LSK chairman Nzamba Kitonga. The CoE spearheaded the development of the 2010 Constitution, thereby becoming the most successful of the initiatives set up under the National Accord. The Committee succeeded in steering the country towards a new constitution.[51] Guided by the CKRA 2008, the CoE used both the Bomas and the Kilifi drafts of the constitution to generate a harmonised draft constitution. The harmonized draft was subjected to public participation but was also revised by a parliamentary select committee on constitutional review, which came up with the Naivasha draft. The Naivasha draft was reviewed by the CoE, culminating in a proposed constitution of Kenya.[52] The proposed constitution of Kenya was subjected to a referendum in June 2010 and was approved by majority of Kenyan voters. It was officially promulgated as Kenya's constitution on 10 August 2010.[53]

The other National Accord initiatives were less successful compared to the CoE. The Grand Coalition Government, for instance, remained mired in constant bickering over the actual power of the prime minister vis-à-vis that of the president, with the president retaining most of the powers.[54] On the other hand, the Waki Commission of Inquiry set out to investigate the perpetrators behind the PEV, identified high profile personalities who perpetrated the violence. It recommended that the perpetrators be prosecuted either through a special judicial mechanism constituted locally by the National Assembly, or by the International Criminal Court (ICC). The recommendation for a locally constituted special judicial mechanism was

[51] E. T. Ekiru, 'Remembering Senior Counsel Nzamba Kitonga: An Architect of Kenya's 2010 Constitution and a Defender of Democracy', *The Platform*, No. 58 (2020): 13–16; M. Mutua, 'Nzamba Kitonga, lion of the law', *Sunday Nation*, 8 November 2020, 29.
[52] S. Muyesu, 'Bomas Draft: The Constitutional Moment We Lost', *The Nairobi Law Monthly*, 11, No. 3 (2019): 22–25.
[53] Odinga and Elderkin, *Raila*, 397; Gitari, *Troubled*, 285; W. Menya, 'How lawmakers mutilated draft in Naivasha', *Daily Nation*, 27 August 2020, 24; Y. P. Ghai and J. C. Ghai, 'How plan for 14 counties was hijacked to create 47', *Sunday Nation*, 6 September 2020, 26; Kindiki, 'Constitution-Making', 11–14; A. Ndegwa, 'Why Ruto opposed powerful president in Naivasha talks', *Daily Nation*, 30 October 2020, 26; A. Ndegwa, 'Uhuru had a lot of doubts about gender quotas', *Daily Nation*, 24 September 2020, 24; D. Mwere, 'After the 2007 mayhem, country saw the need to chart a new path', *Daily Nation*, 27 August 2020, 26.
[54] N. Cheeseman and B. M. Tendi, 'Power-sharing in comparative perspective: the dynamics of "unity government" in Kenya and Zimbabwe', *The Journal of Modern African Studies*, 48 (2010): 203–229.

not enacted, triggering the ICC to take over the cases against the high-profile individuals. The ICC eventually dismissed the cases against the individuals for lack of evidence.[55]

The TJRC which was set up to establish historical injustices, provide justice to victims of state brutality and promote reconciliation among Kenyans failed to gain public trust, making it struggle to execute its mandate. This was due a number of factors. These included lack of support from key players such as the President and the Prime Minister, interference by the Justice Minister Mutula Kilonzo and Chief Justices Evans Gicheru and Willy Mutunga and a credibility crisis due to the Commission having a chairman who was accused of having been a player in some of the atrocities the TJRC was investigating.[56]

Checks and Balances and the Kibaki Administration after the 2007 Post-Election Crisis

The passage of the 2010 Constitution had tremendous ramifications for the rule of law in Kenya. Not only did it usher in the third dimension in the relationship between the Kibaki administration and the rule of law in the country, it also significantly reconfigured the relationship between the executive and the rule of law institutions. The constitution deliberately promoted the principles of the rule of law, focusing on constitutionalism, reinforcing checks and balances and emphasising due process.

Judiciary

In reinforcing checks and balances, the new Constitution enacted at least one major change in favour of judicial independence. This involved changing the structure of the judiciary by introducing the Supreme Court of Kenya (SCOK) and reconstituting the Judicial Service Commission (JSC). Prior to the change, the highest court in Kenya had been the Court of Appeal. On the other hand, the JSC had been reduced into a weak agency within a department of the executive. With both changes, the judiciary acquired two important organs which

[55] Odinga and Elderkin, *Raila,* 363–364; M. Wangari, 'Report reveals why Kenya ICC cases were bungled', *Daily Nation,* 27 November 2019, 25; V. Achuka, 'Gicheru coordinated scheme to influence witnesses in Ruto's case', *Sunday Nation,* 8 November 2020, 29; W. Menya, 'Controversy hangs over Karim Khan as he takes over at ICC', *Sunday Nation,* 13 June 2021, 31.

[56] R. C. Slye, *The Kenyan TJRC: An Outsider's View from the Inside* (Cambridge: Cambridge University Press, 2018), 1-5; K. Ngotho, 'Barons'; N. Musau, 'How compromised team and politicians sacrificed the truth on TJRC report', *Sunday Standard,* 16 September 2018, 27; N. Musau, 'Ugly spats as Kiplagat's wits threw colleagues off course', *Sunday Standard,* 16 September 2018, 29; E. Asaala and N. Dicker, 'Truth-seeking in Kenya: Assessing the Effectiveness of the Truth, Justice and Reconciliation Commission of Kenya', *Africa Nazarene University Law Journal* 1, No 2 (2013): 147–164; B. Wambugu, 'Top judges whose conduct was found wanting as "mtukufu" era faded', *Daily Nation,* 8 February 2020, 23.

helped infuse within it a hierarchy necessary to counter domination by the executive.[57] Besides changing the structure of the judiciary, the new Constitution also demanded at least two major changes in the institution. First, it required the resignation of Evans Gicheru, the Chief Justice who was serving at the time of the enactment of the Constitution. In his place, a new Chief Justice would be recruited in a process spearheaded by the newly constituted JSC, with little influence or interference from the executive.[58]

The JSC went ahead and recruited Willy Mutunga as the first Chief Justice under the new Constitution. Prior to the JSC taking over the process, however, the Kibaki administration attempted to appoint Court of Appeal Justice Alnashir Visram as the new Chief Justice. This was contested by Prime Minister Raila Odinga, leading to the revocation of the appointment and the taking over the recruitment process by the JSC. The JSC-led process became one of the first steps towards making the judiciary independent of the executive.[59]

The new Constitution also demanded a new vetting of the judiciary with a view to ridding the institution of judges deemed unfit to serve in it. Following this directive, the Kibaki administration constituted a Judges and Magistrates Vetting Board chaired by veteran lawyer Sharad Rao. The board went ahead to investigate and declare a number of judicial officials unfit to serve, among them Court of Appeal Justices Riaga Omollo, Samuel Bosire, Emmanuel O'Kubasu and Joseph Nyamu, and High Court judge Murugi Mugo. Other judges such as Richard Kwach offered to resign rather than face the board. The overall expectation from the vetting was that it would improve the integrity of the judiciary.[60]

Parliament

For parliament, the new Constitution set up at least three significant changes which reinforced the institution's independence from the executive. First, it re-introduced the bicameral parliamentary system of senate and national assembly. Although the senate's

[57] Mbondenyi, 'Unclogging', 342–343; J. C. Ghai, 'An overview of the Kenyan Judiciary', in *Judicial Accountability in the New Constitutional Order*, ed. Jill Cottrell Ghai (Nairobi: The International Commission of Jurists Kenyan Chapter, 2016), 23–29; W. O. Khobe, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective', in *Judicial Accountability in the New Constitutional Order*, 47–71.
[58] Mbondenyi, 'Unclogging', 336–337.
[59] Odinga and Elderkin, *Raila*, 398; E. Shimoli and E. M. Gekara, 'Kibaki names new Chief Justice as ODM protests', *Daily Nation*, 26 January 2011, 1; 'Kibaki appoints Justice Visram as CJ, Prof Muigai AG', *The Standard*, 28 January 2011, 1; W. Menya, 'Ahmednasir Abdullahi: The trouble with Uhuru, Raila and Ruto', *Sunday Nation*, 19 September 2021, 16.
[60] Wambugu, '"Mtukufu"'; J. Kamau, 'Demolitions'.

powers were whittled down by the parliamentary select committee on constitutional review that met in Naivasha during the negotiations prior to the referendum for the proposed constitution, it still retained a significant role, especially in protecting the newly instituted devolved governments. Secondly, the new Constitution provided for a complete separation of parliament from the executive by abolishing the practice of having ministers and assistant ministers appointed from among MPs. Thirdly, it provided for increased oversight on the executive by setting up parliamentary committees. The three changes were expected to lead an independent parliament which could hold its own against the executive.[61]

The Electoral Management System

The 2010 Constitution provided for an Independent Electoral and Boundaries Commission (IEBC), which consisted of both commissioners and a secretariat. The commissioners were recruited through a three-way process which ensured the active involvement of a recruiting panel, parliament and the President. The commissioners were to serve a fixed period of time, with little direction from the executive or any other institution.[62] The new IEBC conducted its first election in 2013, resulting in litigation at the newly established Supreme Court of Kenya over alleged mismanagement of the presidential election. Nevertheless, the IEBC was absolved of intentional wrong-doing, especially the suspicion that it was still under executive manipulation.[63]

New Institutions for Restraining the State

The 2010 Constitution provided for additional checks and balances institutions in addition to the judiciary and the bicameral parliament. It also reinforced existing institutions such as the KNCHR, the Kenya National Audit Office (KENAO) and the Ethics and Anti-Corruption Commission (EACC). These institutions were given additional constitutional protection and expanded mandates, with the EACC becoming a constitutional commission responsible for not just tackling corruption but also enforcing standards for ethics and integrity among

[61] Mbondenyi, 'Unclogging', 336–337; Menya, 'Mutilated'; Y. P. Ghai and J. C. Ghai, '14 counties', Ndegwa, 'Ruto'; Njonjo, 'Westminster'.
[62] Odinga and Elderkin, *Raila*, 364–365; B. Sihanya, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms', *The Law Society of Kenya Journal* 13, No. 1 (2017): 1–29.
[63] Onyando, *Quest,* 40-41; G. Lynch, N. Cheeseman and J. Willis, 'From Peace Campaigns to Peaceocracy: Elections, Order and Authority in Africa,' *African Affairs* (2019), 6–16; Maina, *State Capture,* 28–29; K. Ngotho, 'The system played Uhuru, Musalia in 2013 elections', *Sunday Nation,* 16 August 2020, 29; K. Ngotho, 'Untold story of succession wars inside Kibaki State House', *Sunday Nation*, 6 May 2018, 29.

leaders through Chapter Six of the new Constitution.[64] The new Constitution also established new checks and balances institutions to reinforce the separation of powers. The AG's office for instance was divested of the Directorate of Public Prosecution (DPP), making the DPP an independent institution. The Constitution also introduced the Gender and Equality Commission (GEC), the Controller of Budget and the Commission for Administrative Justice (CAJ) which largely assumed the responsibilities of the Ombudsman.[65]

New elaborate oversight mechanisms were introduced for sectors where executive dominance had been especially perversive such as the security and electoral management sectors. Within the security sector, besides rebranding the Kenya Police Force as the National Police Service, the new Constitution also provided for the Independent Police Oversight Authority (IPOA) and the National Police Service Commission (NPSC). Whereas the IPOA was to provide independent oversight on police activities by investigating and sanctioning cases of abuse of power within the newly rebranded Service, the NPSC was to ensure professionalism in the recruitment and administration of personnel in the Service. Most of these reforms were based on recommendations from the 2009 Police Taskforce, which was headed by the UN's Philip Ransley.[66]

The Kibaki administration thus faced the most dynamic rule of law context of any Kenyan administration during its period in power. The context had at least three dimensions. In the first dimension, the administration inherited the institutions set up under the old 1963 Independence Constitution, but which had undergone significant alteration to concentrate power in the executive. The administration's first years in power sought to maintain aspects of this status quo. However, this triggered the PEV election of 2007/08.

The crisis led to the second dimension of the administration's interaction with the rule of law institutions. It ushered in a period of reform and reconciliation. Out of the second dimension, a third dimension emerged, especially with the promulgation of a new constitution in August 2010. The new constitution altered the country's rule of law terrain by not only populating it with new institutions, but also reinforcing older ones. The new set up left the country with a dynamic rule of law context in which executive power began to be vigorously contested,

[64] Gathii, 'Anti-Corruption Agenda', *Development Review*, 68–73.
[65] Akech, 'Abuse'; W. O. Khobe, 'The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya', *Kabarak Journal of Law and Ethics* 4 (2019): 135 – 164; Mbondenyi, 'Introductory', 22–37.
[66] A. Songa, *Transitional Justice in Kenya as a path to Transformation: Comparative Study of Transitional Justice in Africa*, The Centre for the Study of Violence and Reconciliation, 2018, 39–46.

reducing its ability to dominate every facet of Kenyan life as had been the case prior to the new constitutional dispensation.

5.3 Kibaki Administration and Vertical Accountability

In the last years of the Moi administration, the country witnessed a rise in vertical accountability actors who worked to bring an end to the administration's reign. Not only had the three long-standing vertical accountability actors (that is the faith-based groups, the media and the labour movement) survived the destructive onslaught which the Moi administration had unleashed against them, they had also been joined by others. Among these were student movements, underground dissident groups such as Mwakenya as well as musicians and artists. In addition, local but externally-supported NGOs such as the KHRC and the Green Belt Movement had also emerged as important centres of mobilisation against the Moi administration.

The Kibaki administration rode to power on a popular wave in which vertical accountability actors played a significant role. The actors not only opposed the Moi administration's excesses, but also helped raise public consciousness against the administration. Some NGOs provided the platform from which sprang many of the leaders who became part of the new Kibaki administration. Upon getting into power, the Kibaki administration relaxed most of the restrictions that the Moi administration had placed on the vertical accountability actors. In doing so, the administration minimised the conflicts that had been witnessed between government and the actors in earlier administrations. The only exception to this were sections of the mainstream media, which at some point during the new administration's reign suffered direct attacks for their reportage of goings-on within the administration.

The relaxed environment provided by the Kibaki administration led to a golden era for the expansion of vertical accountability actors across the country. Organisations such as the giant labour union COTU, which had been dormant since its silencing by the Jomo administration became vibrant again, joining its erstwhile affiliates such as the KNUT and the UASU in defending workers' rights.[67] In addition, spheres such as the academia, which the Moi administration had stifled through restrictive administrative controls became active again, with the Kibaki administration removing the controls. A similar relaxation of controls saw the

[67] Akuma and Chacha, *Atwoli*, 79–80.

growth of NGOs and other types of CSOs that were free to engage in humanitarian, developmental and other activities across the country.

However, the favourable environment for the operations of vertical accountability actors had its own drawbacks. These sprang from four main sources. First, without major conflict between government and vertical accountability actors, many of the actors lost their visibility as champions of good governance. Secondly, vertical accountability actors lost their clout to the political opposition, which improved its ability in articulating restraints on the administration. Thirdly, the Kibaki administration co-opted members from among the vertical accountability institutions, leaving them with less talent as well as credibility to challenge it. More significantly, the politics of the Kibaki era, especially after the 2005 referendum, became more ethnicised. This affected all segments of society, including among vertical accountability actors, many of whom became divided along ethnic lines in their response to the challenges posed by the Kibaki administration.[68]

Faith-based Entities and the Kibaki Administration

Both the church and the labour movement lost their clout as vertical accountability actors due to the environment set up by the Kibaki administration. The labour movement lost its clout when organisations within it such as the KNUT and the UASU, which had been visible in restraining the Moi administration, retreated into their particular professional domains to concentrate on the welfare of their members rather than fight for the good of the whole country.[69] However, it was the church that lost arguably the most clout under the Kibaki administration. Unlike during the era of administrations prior to the Kibaki era, the church was mostly silent in the face of government excesses under the Kibaki administration. It only spoke out on rare occasions. One such rare occasion was in April 2009 when the NCCK Secretary General, Peter Karanja, denounced the squabbles that broke out in the running of the Grand Coalition Government centred around the personalities of President Kibaki and Prime Minister Odinga.[70]

[68] Sihanya, Interview.
[69] J. N. Momanyi, 'Protecting labour rights in Kenya, a fallacy? Examining the state of labour rights in the NARC Era', *The Rule of Law Report* (2005): 78–99.
[70] Gitari, *Troubled*, 279 –291; P. Ngau and M. Mbathi, 'The Geography of Voting in Kenya: An Analysis of the 2007 Presidential, Parliamentary and Civic Voting Patterns', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, 144–146; E. Ondieki, 'NCCK's tough man finally serves himself humble pie', *Sunday Nation*, 1 September 2019, 12.

The church's standing was further diminished when sections within it rejected the proposed 2010 Constitution. This forced retired church leaders such as David Gitari and Timothy Njoya, who had been at the forefront of the campaign for constitutional change in the country, to come out of retirement and campaign for the adoption of the new Constitution, in defiance of the position taken by their churches.[71] Overall, however, the church remained divided along ethnic lines, just like most other societal groups due to the heavy ethnicisation of politics that defined the Kibaki era.[72]

On the other hand, organisations within the Muslim faith became more active in asserting their presence in the country's politics. The Kibaki era witnessed increased mobilisation of the Muslim community, with at least two organisations emerging to counter the dominance of the government affiliated SUPKEM. These were the Council of Imams and Preachers of Kenya (CIPK) formed in 1997 and the National Muslim Leaders Forum (NAMLEF) formed in 2003. Both entities were active in the country's electoral politics, going to the extent of entering into a Memorandum of Understanding (MoU) with the ODM party in the 2007 election. The MoU committed the NAMLEF and its associates to mobilise Muslim support for the ODM presidential candidate Raila Odinga in exchange for the candidate's pledge to deal with issues affecting Muslims once elected. The MoU generated heated debate, with evangelical churches within the Christian faith even publishing a fake draft of the MoU which claimed that the presidential candidate had promised to recognise Islam as the only religion in the country. Nonetheless, the MoU resulted in the nomination of Sheikh Mohamed Dor as MP representing both NAMLEF and CIPK.

Besides engagement in the country's politics, both NAMLEF and CIPK were at the forefront of championing Muslim rights against infringement by government laws and policies. One area where the two organisations successfully restrained government was in the development and enactment of the Suppression of Anti-Terrorism Bill of 2003, which was mooted in the wake of the 9 September 2001 terror attack in the US. The two organisations denounced the Bill as aimed at discriminating against Muslims as it contained provisions on dressing and body searches which would infringe on the basic rights of Muslims. In April 2003, the two organisations teamed up with the LSK to stop the government from enacting the Bill. They requested the LSK to review the Bill to expunge what they considered anti-Muslim

[71] Gitari, *Troubled*, 286–289.
[72] Chacha, 'Pastors or Bastards?' 111–131; Gitari, *Troubled*, 276.

provisions. To intensify pressure on government to drop the Bill, NAMLEF and CIPK organised public demonstrations in July 2003. It was not until 2012 that the government eventually managed to pass the Bill as the Prevention of Terrorism Act of 2012, having removed most of the provisions the two Muslim organisations objected. In addition, the two organisations were also active in campaigns for the proposed constitution for Kenya, mainly advocating for devolution and entrenchment of Kadhi courts in the Constitution.[73]

The Media under the Kibaki Administration

Teaming up with Muslims to restrain the Kibaki administration were sections of the mainstream media. Although the media environment under the administration was marked by a turf war over regulation, with the Media Council of Kenya emphasizing self-regulation whereas the Ministry of Information sought to assign the role to government, the environment largely remained conducive to media activities. To boost this friendly environment, the administration relaxed restrictions on media freedoms that had been imposed by earlier administrations. It also introduced the Office of Public Communications, which was expected to improve government communication and dealings with the media.[74]

A specific component of the media which the Kibaki administration promoted significantly was the new ICT-based media. The administration removed the key obstacles that the preceding Moi government had placed on the media and also made huge investments in it, thus turning it into a key component of the media landscape in Kenya.[75] Responding to the positive environment, the media grew exponentially, which increased its capability to advance transparency in public affairs.

In spite of the positive environment for media operations under the Kibaki administration, there were at least two negative developments in the media-Kibaki administration relations. First, a series of events hinted at the administration's unease with the media. The first of these events was physical raids on media houses, with the first raid targeting the headquarters of the Nation Media Group in the Nairobi central business district by the First Lady Lucy Kibaki on 2 May 2005. The raid was ostensibly to punish the media house for the way it had reported a dispute the First Lady was said to have had with one of her neighbours in the

[73] Ndzovu, *Muslims,* 59–137.
[74] O. Namwaya, 'Media, Public Education and Information', in *Discourses on Kenya's 2007 General Elections: Perspectives and Prospects for a Democratic Society*, 92–93; Gitonga-Wanjohi, *Ochieng,* 250.
[75] Warigia, 'Governance', 87–90; Walubengo, 'ICTs'; P. Kariuki, 'Kibaki's letter gave birth to Kenya's famed Silicon Savannah', *Daily Nation,* 30 August 2019, 12.

Nairobi suburb of Muthaiga. Following the raid, the Nation Media Group became more sensitive in the way it portrayed the First Family throughout the Kibaki era.[76]

The second raid targeted the headquarters of the Standard Group on 2 March 2006. The raid aimed at stopping the publication of a story allegedly linking powerful government officials to drug trafficking. The raid was alleged to have been carried out by the controversial Artur brothers whose presence and activities in the country were the subject of much speculation. The media had exposed the controversial duo, indicating that it had been brought to the country by rogue government officials in a drug-related operation. To stop the publication of the story, the duo raided the Standard Group, disrupting operations at the media house and holding it hostage for several hours.[77]

Other skirmishes between the administration and the media involved arresting a *Standard* editor on 2 October 2003 for reporting on the assassination of Chrispine Odhiambo Mbai; disagreement over the position of local content in media production between the Ministry of Information and the Union of Journalists; a crackdown on what the administration dismissed as the 'gutter' press in January 2004; and libel charges against the *Standard* for the reports it carried against Interior Minister Chris Murungaru.[78] A more serious development in the media-Kibaki administration relations was the administration's passage of the the Communications (Amendment) Act in 2009. The Act gave government powers to raid and search media houses as well as suspend media activities. Along with the Statute Law Miscellaneous (Amendment) Act of 2002, which the administration failed to amend to reduce libel charges on media publications, the two laws remained a constant source of anxiety for media activities during the Kibaki administration.[79]

The media itself acquired features which weakened its ability to restrain the Kibaki administration. Like the rest of society, the media was divided along ethnic lines. As a result,

[76] 'Kenya's First Lady storms paper', *BBC News*, 3 May 2005, http://news.bbc.co.uk/2/hi/africa/4507975.stm (accessed on 10 September 2021); J. Vasagar, 'President's Wife storms Kenyan newspaper', *The Guardian*, 4 May 2005, https://www.theguardian.com/media/2005/may/04/pressandpublishing.kenya (accessed on 10 September 2021); 'Lucy Kibaki: A fierce defender of family', *The East African*, 30 April 2016, 4; Forole. 'Crusade', *American University International Law Review*, 72-77.

[77] Ali and Onsarigo, 'Artur brothers'; 'Artur brothers deported after gun drama at airport', *Daily Nation*, 10 June 2006, 2; T. Omulo, 'Court to Hear Artur Margaryan Case against Raila Odinga', *Citizen Digital*, 26 February 26, 2015, https://www.citizen.digital/news/court-to-hear-artur-margaryan-case-against-raila-odinga-70368, (accessed on 18 September 2021).

[78] Mitula, Odhiambo and Ambani, *Post-KANU*, 28-29.

[79] Forole. 'Crusade', *American University International Law Review*, 72.

it was not only unable to hold the Kibaki administration to account but was also accused of having contributed to the 2007/2008 Post-Election Violence (PEV).[80]

Non-Governmental Organisations and the Kibaki Administration

Non-Governmental Organisations (NGOs) were among the sources of restraint on the Kibaki administration. Just like other vertical accountability actors, NGOs received a boost from the relaxed environment that emerged under the Kibaki administration. Exploiting the favourable environment, and with significant support from external sources including embassies and international development agencies based in the country, the NGOs not only expanded across the country, but also extended into new sectors, with new ones emerging with a specific focus on governance and the rule of law. Three such NGOs were the African Centre for Governance (AfriCog), the Mars Group and the Katiba Institute, all of which advanced oversight in the area of government transparency.[81]

As for external accountability, its influence on the Kibaki administration diminished significantly during the first dimension of the administration's tenure prior to the 2007/08 PEV. During this period, the administration reduced the dependence on external financing which had exposed the preceding Moi government to significant influence by external actors. In addition, the Kibaki administration cultivated a 'look East' policy which increased Chinese influence in the country as a counterbalance to the traditional influence of Western countries. With the reduced influence, Western countries became less visible in restraining the Kibaki administration. The only exception to this was the UK High Commission under Edward Clay who denounced high level corruption in the Kibaki administration.[82]

The role of external actors in restraining the Kibaki administration increased exponentially with the PEV of 2007/2008, which ushered in the second dimension of the Kibaki administration's relationship with the rule of law in the country. This was largely in helping

[80] S. G. Gachigua, 'Fuelling the violence: The Print Media in Kenya's volatile 2007 post-election violence', in *Kenya: The Struggle for a New Constitutional Order*, 47–62; K. Makokha, 'The Dynamics and Politics of Media in Kenya: The Role and Impact of Mainstream Media in the 2007 General Elections', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections,* ed. Karuti Kanyinga and Duncan Okello (Nairobi: Institute for Development Studies, 2010), 289–306.
[81] 'Uhuru Kenyatta's more typing "errors"', *The Standard*, 27 May 2009, 4.
[82] Brown, 'Demiurge', 321–324; *The Independent,* 'Edward Clay: Kenya's government is full of corrupt gluttons', 10 October 2011, https://www.independent.co.uk/voices/commentators/edward-clay-kenya-s-government-is-full-of-corrupt-gluttons-553304.html, (accessed on 12 August 2021); Forole. 'Crusade,' *American University International Law Review*, 39; J. Kamau, 'Kenya-UK "complicated relationship" since days of Jomo, Moi and Kibaki', *Sunday Nation,* 18 April 2021, 29.

the country deal with the post-election crisis. Amongst these external actors were African continental institutions such as the African Union (AU) and bilateral as well as multilateral institutions such as the ICC, all of which helped in diffusing the tensions the PEV had created in the country and in pushing the Kibaki administration to embrace the reforms that would pull the country out of the crisis.[83]

Overall, the Kibaki administration's relationship with vertical accountability actors involved both positive and negative features. Among the positive features was the fact that the administration removed most of the restrictions of the previous administrations on these actors. With the resulting favourable environment, vertical accountability institutions grew exponentially across the country. They engaged in numerous forms of restraining the government from excesses.

On the negative side, however, the reforms the Kibaki administration embarked on empowered other actors in accountability, especially parliament and the political opposition, making them more visible in restraining the administration. This left the traditional vertical accountability institutions such as the church without much relevance in the work of restraining government. Further, the Kibaki administration, having largely benefitted from support from vertical accountability actors prior to ascending to power, reciprocated by appointing members of these institutions into government, thus leaving the institutions with less talent with which to continue restraining government.

More fundamentally, politics under the Kibaki government became more ethnicised. This extended even into societal groupings, among them vertical accountability actors. This left the actors divided along ethnic lines and therefore unable to effectively restrain the government. It was under this environment of both positive and negative developments for vertical accountability actors that the LSK operated during the Kibaki administration. How it navigated this terrain is discussed in the next section.

[83] E. O. Asaala, 'Prosecuting the 2007 Post Violence-Related International Crimes in Kenyan Courts: Exposing the real challenges', in *Human Rights and Democratic Governance in post-2007 Kenya: A post-2007 Appraisal*, 345–361; Odinga and Elderkin, *Raila*, 330–361; B. Sihanya and D. Okello, 'Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement', in *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, 679–701; E.N. Wamae, 'Mediating Kenya's post-election violence: from a peace-making to a constitutional moment', in *Kenya: The Struggle for a New Constitutional Order*, 70–74.

5.4 LSK Response to the Kibaki Government

Unlike the administrations before it, the Kibaki administration received massive support from members of the LSK prior to gaining power. The support continued in the immediate aftermath of the 2002 election. Under the leadership of its first female leader, Raychelle Omamo (2001–2003), the LSK had at least two of its prominent members, namely Kiraitu Murungi and Martha Karua, join the new administration as Cabinet ministers. Other members such as Paul Muite emerged as leaders within parliament, serving on important parliamentary committees aimed at reforming the country's governance.[84] During the same early period, the Kibaki administration received praise from the LSK for establishing the KNHCR.[85]

A major area of collaboration between the LSK and the new administration was in reforming the judiciary. This took two dimensions. First, the LSK called for the resignation of Bernard Chunga, the last Chief Justice under the Moi administration. Seizing the momentum provided by the LSK, the Kibaki administration declared that it was forming a tribunal to investigate the Chief Justice. Rather than face the tribunal, Chunga resigned and was replaced by Evans Gicheru as the new Chief Justice.[86] Secondly, both the LSK and the Kibaki administration embarked on what was called the 'radical surgery' of the judiciary. The purpose of the exercise was to remove from the institution officials who had brought disrepute to it through unprofessional conduct. To undertake the exercise, the Kibaki government appointed a committee chaired by Justice Aaron Ringera, which came up with a report containing a list of 23 out of 45 Court of Appeal and High Court judges and 82 of the 254 magistrates accused of unprofessional behaviour. The committee handed the list over to Chief Justice Evans Gicheru with the recommendation that the implicated individuals be given two weeks in which to either resign from their positions or face prosecution for corruption. In total, the exercise led to the resignation of 20 judges and 82 magistrates, about 50% of judicial officers.[87]

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[84] The Law Society of Kenya website: https://lsk.or.ke/about-us/ (accessed on 9 September 2018); P. Nabiswa, 'Mirathi ya Siasa: Chama cha wanasheria kimechangia ufanisi mkubwa katika maswala ya sheria-part 3', *KTN News*, YouTube video, 24:01, 10 August 2020; https://www.youtube.com/watch?v=llzCMHoXGJI;

[85] Mitula, Odhiambo and Ambani, *Post-KANU*, 18–22.

[86] S. Alfan, 'Ahmednasir recalls Judiciary clean up through famous radical surgery', *Nairobi Times*, 30 August 2020, 5; P. Nabiswa, 'Mirathi ya Siasa: Chama cha wanasheria kimechangia ufanisi mkubwa katika maswala ya sheria – part 2', *KTN News*, YouTube video, 3 August 2020, 28:10 Mirathi ya Siasa: Chama cha wanasheria kimechangia ufanisi mkubwa katika maswala ya sheria- part 2,'

[87] P. Nabiswa, 'Mirathi ya Siasa: Utendakazi wa wakuu wa mashtaka ya uma nchini - Sharad Rao, Benard Chunga, Unita Kidulla, Philip Murgor, Noordin Haji', *KTN News*, YouTube video, 12 November 2019, 24:18, https://www.youtube.com/watch?v=kxy7ak95AQ8; Muthoni, '"radical surgery"'; Alfan, 'Ahmednasir'; A. Abdullahi, 'Radical surgery of the Judiciary was right and proper', *Daily Nation*, 30 January 2007, 16.

The LSK, now under the chairmanship of Ahmednassir Abdullahi, provided unequivocal support to the radical surgery. Its interest in the exercise stretched back to the period towards the end of the Moi administration, when the organisation had staged regular public demonstrations against impropriety and unprofessional conduct within the judiciary. The LSK therefore saw in the radical surgery an opportunity to deal with the problem.

The support the LSK lent to the exercise was in three ways. First, it defended the radical surgery from attacks by critics, who claimed that the exercise did not offer those accused of unprofessional conduct an opportunity to clear their names. The LSK dismissed the criticism, urging those targeted by the exercise to use the judicial process to clear their names. Secondly, the organisation conferred the Law Society of Kenya Award on Justice Aaron Ringera in 2003 for leading the radical surgery. Thirdly, LSK drew up a list of some 35 lawyers, who it recommended to replace the judicial officials that had been purged from the judiciary under the radical surgery.[88]

However, the initial goodwill between the Kibaki administration and the LSK soon started fizzling out. This was especially so during the tenures of Abdullahi (2003–2005) and Tom Ojienda (2005–2007) as chairmen of the LSK. Part of the reasons for the end to the initial good relations was that the administration sought to retain some of the status quo inherited from the Moi administration, which brought it into conflict with the LSK.[89]

The first open conflict between the LSK and the new administration broke out in September 2004. The main reason for the conflict was the membership of the KACC. LSK was partly responsible for determining membership of the Commission since it was a leading member of the KACC Advisory Board that was responsible for interviewing and making recommendations for appointment into the Commission to the President. As chairman of the KACC Advisory Board, LSK chairman, Ahmednasir Abdullahi, had presided over interviews and recommended that the President appoints four directors to the KACC. However, the Kibaki administration accepted only three of the recommended directors, rejecting the fourth one for what it said were integrity issues. This led to vigorous protests from the LSK, with Abdullahi not only resigning as chairman of the KACC Advisory Board, but also

[88] Mitula, Odhiambo and Ambani, *Post-KANU*, 49; S. Kiplagat, 'Ahmednassir fearlessly fights for judicial independence', *Sunday Nation,* December 16, 2018, 12; Nabiswa, 'Mirathi - part 3'; P. Nabiswa, 'Mirathi ya Siasa: Chama cha wanasheria kimechangia ufanisi mkubwa katika maswala ya sheria', *KTN News,* YouTube video, 27 July 2020, 27:17, https://www.youtube.com/watch?v=z_PWVxi8MSQ; 'The Prescription for the Judiciary is Radical Surgery', *The Standard*, 9 March 2003, 19; Abdullahi, 'Radical surgery'.
[89] Alfan, 'Ahmednasir'; Mutunga, 'A new Bench-Bar relationship', 73.

withdrawing LSK membership from the Board.[90] Abdullahi's actions were further reinforced by the LSK council, which faulted the President for rejecting the Board's recommendations, accusing him of overstepping his mandate and threatening to go to court over the matter. This heralded a long fight between the LSK and the Kibaki administration over the control of the anti-corruption institutions, a fight which only ended under the chairmanship of Okong'o Omogeni, one of Abdullahi's successors.[91]

Besides disagreement over the powers of the President to appoint the anti-corruption officials, the second area of open conflict between the LSK and the Kibaki administration was the Anglo Leasing Scandal, which came into the public domain in April 2004. The LSK blamed the scandal on wrong advice given to the administration by the AG Amos Wako. LSK went ahead and initiated judicial proceedings against the AG for the scandal. However, the process was scuttled before it could lead to serious repercussions for the AG.[92]

The third area of conflict between the Kibaki administration and the LSK involved the CKRC-led constitution-making process, which had resumed upon the assumption of office by the administration. However, the process soon stalled when government walked out of a delegates' conference that was taking place at the Bomas of Kenya in Nairobi, and which was debating the final draft constitution developed by the CKRC. Explaining the walk-out, the government claimed that the conference had been infiltrated and hijacked by its rivals, who had then gone ahead to impose on the country a draft constitution that was unworkable. The government went ahead and instituted a parallel process led by AG Amos Wako, which came up with a reworked version of the CKRC (Bomas) draft, which was popularly referred to as the Kilifi draft.[93]

The LSK responded to these developments by condemning both the government and the political opposition for the breakdown of the constitution-making process. To keep the country on the path towards a new constitution, the LSK drafted what it held would be a compromise constitution, reducing the CKRC (Bomas) draft from more than 300 articles to only about 27 articles. Among the provisions within the 27 articles of the LSK draft

[90] Mitula, Odhiambo and Ambani, *Post-KANU*, 70–71.
[91] 'Anti-corruption boss quits in protest over Kibaki', *Daily Nation*, 14 September 2004, 3; 'Now minister quits as storm rages on Rotich', *Daily Nation*, 15 September 2004, 1; S. Ndonga, 'Omogeni To Challenge Ahmednasir For JSC Slot', *Capital News*, 31 October 2013 https://www.capitalfm.co.ke/news/2013/10/omogeni-to-challenge-ahmednasir-for-jsc-slot/, (accessed on 16 January 2022); Nabiswa, 'Mirathi – part 2'.
[92] Nabiswa, 'Mirathi – part 3'.
[93] Gitari, *Troubled*, 286-289; Odinga and Elderkin, *Raila*, 330–361.

constitution included strong provisions on government accountability, the Bill of Rights and devolution. It also emphasized clarity and conciseness in the draft.[94]

The Kibaki administration not only ignored the LSK intervention, but also went ahead to present the Kilifi draft to a public referendum in November 2005. The LSK, under the chairmanship of Tom Ojienda, teamed up with the political opposition, and together successfully campaigned against the government-sponsored draft. Although the campaign against the government-sponsored draft constitution was successful, it left the LSK divided along the 'no'/'yes' factions, with many lawyers, including LSK council members and former chairpersons supporting opposite sides of the referendum.[95]

A less divisive area of conflict between the Kibaki administration and the LSK involved the resolution by the Chief Justice Evans Gicheru that any lawyer who sought to challenge government directives would have to file their objection in Nairobi. The LSK protested the move, seeing it as overly centralising judicial services and aimed at stifling the ability of lawyers to challenge government policies. The initial LSK protest against this resolution was led by Tom Ojienda. Upon assuming office in early 2007, Ojienda's successor, Okong'o Omogeni (2007–2010) moved the protest a notch higher by appealing directly to the President in September 2009 to sack the Chief Justice, both because of issuing the directive and for professional misconduct, including participation in the controversial swearing-in of the President after the disputed 2007 election. The President rejected the LSK demand.[96]

The final area of conflict between the Kibaki administration and the LSK in the administration's initial interaction with the rule of law involved the controversial 2007 election, which evolved parallel to the electoral process itself. The first area of concern for the LSK was the pre-election arrangements which the administration unveiled. On Christmas eve of 2007, Omogeni condemned the Police Commissioner for announcing a prohibition of voters gathering within a radius of 400 metres of polling stations. Both the LSK and the political opposition dismissed the move as aimed at manipulating the elections at the polling stations.[97] Once the votes had started streaming the national vote tallying centre at the KICC, the Police Commissioner announced that the centre had been put under strict restrictions of

[94] Nabiswa, 'Mirathi – part 3'.
[95] Ibid.
[96] Oseko, 'Reform', 165–167; Khamala, 'Incremental'; Nabiswa, 'Mirathi – part 2'.
[97] Odinga and Elderkin, *Raila*, 314.

access. Again, the LSK denounced the restrictions, telling the Police Commissioner that he had no mandate to restrict access to the vote tallying centre.[98]

Responding to the release of the results of the presidential election and the hurried swearing into office of President Kibaki for a second term, Omogeni convened a press conference in which he called on the President to resign from office and for the country to hold a repeat election. Government, led by the Minister for Justice and former LSK council member Martha Karua, responded to the LSK statement by accusing Omogeni of not only being a member of the opposition ODM party, but also of making a unilateral decision in dismissing the election, without consulting the LSK council.[99]

The disputed election itself ushered the second dimension of the Kibaki administration's interaction with the rule of law institutions. Much of the focus during this dimension was recovery from the PEV of early 2008, which followed the disputed election. The period witnessed international mediation which resulted in a number of initiatives aimed at reforming the country's governance and rule of law terrain. In line with this, numerous initiatives were embarked on, including setting up of institutions such as the TJRC, which was expected to deal with historical injustices partly blamed for the violence, the National Cohesion and Integration Commission (NCIC) expected to deal with issues of national cohesion and integration, the Kriegler Commission to undertake a forensic audit of the 2007 elections to establish what had happened, the Waki Commission to identify the perpetrators of the PEV and the Committee of Experts to spearhead the constitutional review process.[100] Both Omogeni and his successor, Kenneth Akide (2010–2012) were active in bringing the LSK on board in most of these initiatives. For instance, the organisation constantly cajoled the Grand Coalition Government to work together whenever there were policy differences between the President and the Prime Minister.[101]

It was, however, in the constitution review process led by the Committee of Experts where the organisation's contribution was most significant. This was in providing one of the most critical inputs in the content of what eventually became the 2010 Constitution of Kenya, with most of it aimed at the reform of the judiciary. Through its Annual General Meeting (AGM) in 2009, the LSK made recommendations to improve the way judges were being promoted to

[98] Ibid, 315.
[99] Nabiswa, 'Mirathi – part 3'.
[100] Ibid.
[101] Odinga and Elderkin, *Raila*, 390.

lessen the influence of lobbying and ensure merit and professionalism in the institution. The recommendations aimed at reducing the influence of both the executive and parliament on the process of recruiting judicial officials as a means of enhancing judicial independence.[102] Under the new system, the process of recruitment of the Chief Justice and other senior judicial officials would be handled by a reconstituted JSC. Positions within the judiciary would be openly advertised and shortlisted candidates taken through open interviews. Upon conclusion of the interviews, the JSC would submit names of successful candidates to the President for appointment after vetting by parliament. Although the clause was initially opposed by both the AG Amos Wako and Justice and Constitutional Affairs Minister Martha Karua, it was eventually adopted and enacted into Kenya's 2010 Constitution and was applied in the recruitment of all the Chief Justices who served since the passage of the Constitution.[103]

The enactment of the Constitution in August 2010 ushered in the third dimension of the Kibaki administration's relationship with the rule of law in the country. It introduced far-reaching changes to the country's governance and rule of law terrain, with new institutions aimed at enhancing the three pillars of the rule of law, namely respect for the constitution, existence of checks and balances and due process. Under the new dispensation, the LSK, steered by the outgoing chairman Akide, and incoming chairman Eric Mutua (2012-2016), involved itself in many activities aimed at ushering the dispensation into the country.[104] In the process, its relationship with the Kibaki administration swung between co-operation and disagreement, depending on the issue at hand.[105]

One of the main areas of co-operation between the organisation and the administration in the immediate aftermath of the enactment of the 2010 Constitution was in constituting the Constitution Implementation Committee (CIC). The CIC was constitutionally-mandated to monitor the first five years of implementing the new Constitution. It was chaired by Charles Nyachae, a former council member of the LSK. Several members of the Committee were also active LSK members.[106]

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[102] Khamala, 'Incremental'.
[103] P. Nabiswa, 'Mirathi ya Siasa: Chama cha wanasheria kimechangia ufanisi mkubwa katika maswala ya sheria- part 4', *KTN News,* YouTube video, 17 August 2020, 27:30, https://www.youtube.com/watch?v=sNLnHEU8gAs; Ghai and Ghai (ed), *Order,* 5.
[104] Songa, 'Transformation', 27.
[105] Sihanya, Interview.
[106] Nabiswa, 'Mirathi - part 3'.

Besides the CIC, the other area of interaction between the Kibaki administration and the LSK was in the reconstitution and management of the judiciary under the new Constitution. However, this process started off in dispute when President Kibaki appointed Court of Appeal judge Justice Alnasir Visram as the new Chief Justice. The appointment was rejected by parliament, which accused the President of not following the laid down procedure under the Grand Coalition Government, where he was expected to consult the Prime Minister.[107] To resolve the dispute, the Kibaki administration withdrew Visram's appointment and left the process of determining the new Chief Justice to the JSC. The JSC itself was reconstituted afresh, with the LSK being represented within it by a member elected directly by LSK members. The first LSK representative in the new JSC was former chairman Ahmednassir Abdullahi, who was chosen in an election which pitted him against another former LSK chairman, Okong'o Omogeni.[108] Abdullahi was replaced by another former LSK chairman Tom Ojienda after serving a two-year tenure in the Commission. The LSK used its direct participation in the JSC to influence the direction the new judiciary took by emphasising the entry of personnel which could promote judicial independence and uphold the integrity of the institution.[109]

The final major area of interaction between the LSK and the Kibaki administration after the enactment of the 2010 Constitution was in the management of the 2013 general election. LSK's contribution to this process took at least two forms. First, the organisation was represented directly in the committee constituted to recruit personnel for the newly created IEBC. The purpose for this was to ensure that the process followed the laid down law and was devoid of manipulation by politicians.

Secondly, upon the declaration of presidential election results by the IEBC and its disputation by the opposition Coalition for Reforms and Democracy (CORD) through a petition at the Supreme Court of Kenya, the LSK chairman Eric Mutua approached the Court and requested to be enjoined in the proceedings as an *amicus curiae*. However, the Court turned down Mutua's request, arguing that the LSK under Mutua had taken sides in the electoral dispute.[110]

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[107] Mutunga, 'Bench-Bar relationship', 63; Y. P. Ghai and J. C. Ghai eds., *The Legal Profession and the New Constitutional Order in Kenya*, (Nairobi: Strathmore University Press, 2014), 7; Nabiswa, 'Rao'.
[108] Ndonga, 'Omogeni'.
[109] Nabiswa, 'Mirathi - part 4'.
[110] Nabiswa, 'Mirathi'.

An important rule of law development during the last years of the Kibaki administration involved the International Criminal Court (ICC). The Court intervened in the country's rule of law terrain to help bring the suspected high-profile perpetrators of the 2007/08 PEV to justice after the failure of the local judicial mechanisms to do so. However, the engagement of the LSK with the process remained scant. The organisation's inaction on the ICC process constituted a strategic silence, building on the legacy of strategic silences which the organisation had been known for during past administrations. Its silence allowed a few individual lawyers to engage with the process. Among these were Maina Kiai and George Kegoro, with their contribution influencing the adoption of the Rome Statute, upon which the ICC was based, in Kenya's the 2010 Constitution. This ultimately facilitated the intervention of the Court in Kenya from 2009.[111]

Nonetheless, by the third dimension of the Kibaki administration, the country had witnessed a swing towards the rule of law as the dominant form of governance, which gave rise to the prominence of lawyers in the emerging institutional framework of governance. This offered the LSK an opportunity to become a major source of the personnel and expertise which came to dominate the emerging governance terrain.

5.5 Kibaki Administration's Reactions to LSK

The response of the Kibaki administration to LSK efforts to restrain it from excesses largely followed the path which the administration had taken against the political opposition and other vertical accountability institutions. This was defined by several realities. First, the administration had come into power riding a wave of popular support, including from the institutions. It therefore felt constrained to attack and weaken the institutions, seeing in them old alliances against the former KANU administration. Secondly, the administration had not only co-opted many of the active vertical accountability actors but had also relaxed most of the restrictions of the KANU-era when it ascended into power. It could not possibly go back to these restrictions in order to deal with the institutions once it had fallen out with them.

Thirdly, under the Kibaki administration, institutions such as parliament and the political opposition sprang up and became much stronger. This in turn made vertical accountability actors such as the church redundant in confronting government over its excesses. The actors therefore remained dormant during the first years of the Kibaki administration. Furthermore,

[111] Sihanya, Interview.

politics under the administration became highly personalised and ethnicised, leading to divisions across society, including within societal organisations, thus rendering them ineffectively in restraining the government.

This is largely the reality which the LSK faced under the Kibaki administration. The administration co-opted a number of the organisation's members into senior government positions. In addition, the organisation's relevance as a voice against government excesses declined with the emergence of a strong political opposition and parliament. More fundamentally, the personalisation and ethnicisation of politics which took place under the Kibaki administration also extended into the LSK. The organisation remained unable to present a unified picture over such monumental events in the administration's life as the 2005 constitutional referendum, the disputed 2007 presidential election and the intervention by the ICC in Kenya's rule of law terrain, with various factions emerging to champion different positions.[112]

These divisions fed on some of the already existing fissures within the LSK, with three standing out. The first fissure had been over the resignation of Chief Justice Bernard Chunga, shortly after the Kibaki administration's ascendancy to power. Whereas the LSK council had demanded the immediate resignation of the Chief Justice, its chairlady Raychelle Omamo had refused to endorse the demand, citing personal relationship with the Chief Justice. This led to her ouster by the council.[113] The second fissure had been over attempts to remove Omamo's successor, Ahmednassir Abdullahi, from the LSK leadership. The attempt saw 134 members petition the LSK council to remove him from the LSK chairmanship. But the council rejected the petition, thus keeping Abdullahi in his position.[114] The third fissure within the LSK was over differences between Nairobi and upcountry lawyers. The upcountry lawyers felt slighted during the Abdullahi tenure, which was part of the reason why a section of lawyers sought to have Abdullahi ousted from the LSK leadership. Nevertheless, this division was resolved during the Ojienda tenure.[115]

Beyond the internal LSK divisions, the Kibaki administration set up at least two measures which were directly antagonistic towards the organisation. The first measure involved the administration's Chief Justice, Evans Gicheru, who tried to limit the capability of lawyers to

[112] Sihanya, Interview.
[113] Alfan, 'Ahmednasir'.
[114] 'Lawyers Lose Bid to Oust LSK Boss', *The East African Standard*, 30 June 2004, 9.
[115] Nabiswa, 'Mirathi'.

challenge government policy by confining only to Nairobi the process of filing cases with the judiciary. The LSK not only protested the move, but also demanded the removal of Gicheru from office for issuing a directive, which the organisation interpreted as aimed at silencing lawyers.[116]

The second antagonistic move which the Kibaki administration directed towards the LSK was in the treatment it meted out to at least one of the LSK leaders who dared to challenge some of the administration's measures. This was former LSK chairman, Okong'o Omogeni. Apparently, the former chairman failed to secure a position within the new institutions which emerged with the passage of the 2010 Constitution. Although he had applied, attended interviews and emerged with adequate qualifications to head the new institutions including the newly reconstituted EACC, the newly established DPP and the National Land Commission (NLC), the Kibaki administration refused to appoint him. Omogeni attributed the administration's reluctance to appoint him to positions he took as chairman of LSK, especially over the disputed 2007 election, in which he had called on the President to resign in order to pave the way for the country to conduct a fresh election.[117]

Overall, however, the conflicts between the Kibaki administration and the LSK were fewer and shorter than those which had occurred under the previous administrations. The crises which beset the administration and the responses they required meant that the administration had little time to engage in protracted fights against institutions such as the LSK. In addition, the reform process which gripped the country towards the end of the Kibaki administration ignited a similar reform within the LSK, leading to at least two changes that enhanced the organisation's capability. The first change targeted the LSK Act, reverting to the title president from chairman for the head of LSK as had been during the colonial era, and increasing the tenure of the president from one to two years. Under the new Act, Eric Mutua emerged as the longest-serving head of the LSK, having served the first year under the old system as the last chairman of the LSK and ushering in the new system as the first LSK president.[118]

The second change was more elaborate and involved the system of recognising LSK members who had distinguished themselves by inducting them into the Senior Counsel bar. The system was set up in 2003 to reward distinction in the legal profession, with the initial

[116] Ibid; Nabiswa, 'Mirathi - part 3'.
[117] Nabiswa, 'Mirathi - part 4'.
[118] Nabiswa, 'Mirathi - part 3'.

criterion for appointment as Senior Counsel being having served as LSK chairperson. However, in 2008 the system was changed to open up the appointment beyond LSK chairpersons. It introduced other new considerations for appointment as Senior Counsel. These included being an advocate of the High Court for more than 15 years and contributing to the development of the legal profession through scholarly writings and presentations. In addition, those seeking to be appointed as Senior Counsel would apply and have their applications vetted by a committee comprising of the AG, a Court of Appeal judge, a High Court judge, three Senior Counsels and four advocates. After vetting, the committee would then recommend the names of successful applicants to the President for conferment of the title. With the changes, the system became a form of meritocratic hall of fame for those who had contributed to the country's legal development.[119]

5.6 Summary

The Kibaki administration's engagement with the rule of law in Kenya involved three dimensions. The first dimension consisted of the system of rule of law which the administration inherited from the preceding Moi administration. The second dimension consisted of the rule of law regime which emerged in the aftermath of the 2008 Post-Election Violence (PEV). The third dimension emerged with the changes which came with the 2010 Constitution, which comprised of both newly created institutions such as the CIC, the DPP and the CAJ and old institutions such as the judiciary, the electoral management body and parliament, but which were extensively reformed to increase their independence from executive interference.

Under the first dimension, the Kibaki administration made early attempts to promote the principles of the rule of law by instituting a number of initiatives to address the impunity that had been witnessed under the preceding Moi administration. Two of the most important of these initiatives were the Commission of Inquiry into the Goldenberg scandal and the constitution review process spearheaded by the CKRC. However, the Kibaki administration abandoned these initiatives prior to their conclusion, which left the administration with the excessive powers provided for by the heavily amended 1963 Independence Constitution. Using these powers, the Kibaki administration engaged in excesses, including perpetrating

[119] I. Oruko, 'Task force wants senior counsel recruited every 2 years', *Daily Nation*, 5 August 2019, 14.

the Anglo Leasing scandal of 2004 and presiding over the controversial 2007 presidential election.

The crisis out of the 2007 electoral mismanagement led to the second dimension of the administration's interaction with the rule of law in Kenya. It mostly consisted of setting up initiatives to help the country recover from the 2007/2008 post-election crisis. One of the most important initiatives was the constitution review process spearheaded by the CoE. The success of the initiative led to the enactment of a new constitution for Kenya in August 2010. The new constitution redefined the rule of law terrain in Kenya, strengthening both the judiciary and parliament against executive interference and setting in place other institutions for enhancing the rule of law in the country.

The three dimensions in the relationship between the Kibaki administration and the rule of law also defined the relationship between the administration and the LSK. Under the first dimension, the interaction between the administration and the LSK was characterised by camaraderie, with the administration receiving support from the organisation. The administration had risen to power riding a popular wave in which the LSK and other vertical accountability actors played a significant role. The actors had not only opposed the Moi administration for its excesses which violated the rule of law but had also vigorously campaigned against the administration. Upon getting into power, the Kibaki administration relaxed most of the restrictions which the Moi administration had placed on the vertical accountability actors including the LSK. It also co-opted some of these actors into government by appointing them into senior positions. On its part, the LSK supported at least two early initiatives of the Kibaki administration. These were the forced resignation of Chief Justice Bernard Chunga and the 'radical surgery' on the judiciary to rid it of judicial officers who had put the institution into disrepute.

Differences between the two, however, emerged eventually. These were centred on at least three issues, namely the powers which the executive enjoyed over the KACC, the constitution-making process and the electoral outcome of 2007. The differences with the administration exposed internal divisions within the LSK, which were centred around political, ethnic and geographic divisions in the organisation, and mostly prevented it from speaking with one voice against the excesses of the Kibaki administration.

With the 2007 post-election crisis, the LSK participated in resolving the crisis. This was mostly through heavy involvement in the constitution-making process and in strengthening the electoral management system. One of the most fundamental contributions from the LSK involved the reform of the judiciary, in which it successfully influenced the adoption of a system of impartial selection of personnel for the judiciary. However, the organisation largely neglected other areas of reform work, especially land reform as well as the TJRC and ICC processes, allowing them to largely falter and fail. Upon the passage of the 2010 Constitution, the LSK supported the implementation of the new constitution mainly through the CIC to which it contributed members and expertise. It also heavily influenced the recalibration of two critical institutions: the IEBC and the JSC.

Overall, the Kibaki administration's interaction with the LSK was characterised by co-operation. Although there were hints of at least two anti-LSK measures from the administration, namely issuing a directive through the Chief Justice Evans Gicheru aimed at making it logistically difficult for lawyers to challenge the administration in courts of law and apparently punishing a former LSK chairman for positions taken against the administration, the administration's influence on the LSK was minimal. The influence was largely by-products of measures instituted by the administration, which affected all other societal organisations, including the LSK.

Two of these measures consisted of strengthening of parliament and the political opposition and making politics highly personalised and ethnicised. The strengthening of parliament and the political opposition made LSK redundant since it took away the platform the organisation had occupied during the Moi administration when the two institutions were muzzled. Personalised and ethnicised politics, on the other hand, led to divisions along similar lines within the LSK, making the organisation, along with others such as the National Council of Christian Churches (NCCK), lose their previous ability to resist government excesses.

CHAPTER SIX

LSK AND THE UHURU ADMINISTRATION, 2013–2022

6.1 Overview

The specific study objective in this chapter is to examine the evolution of the LSK during the Uhuru Kenyatta administration. It commences with the interrogation of the rule of law under the Uhuru administration by establishing how the administration related with both checks and balances and vertical accountability institutions. This provides the general rule of law background in which the LSK operated. The chapter then explores how the LSK attempted to restrain the administration from excesses within this background, examining how the organisation was able to manoeuvre around the terrain laid out for rule of law institutions in the country. It concludes by indicating the reaction of the administration towards LSK's attempts at restraining it.

6.2 Rule of Law under the Uhuru Administration

There were two distinct dimensions to the Uhuru administration and its interaction with the rule of law. The two dimensions corresponded to the administration's first and second terms, with the first dimension lasting from 2013 to 2017, which mostly focused on fighting against the ICC. The second dimension, on the other hand, commenced immediately after the 2017 election and was geared towards shaping President Uhuru Kenyatta's succession in 2022. Both dimensions had implications in how the Uhuru administration related with and shaped the rule of law in the country.

Rule of Law under the pre-'Handshake' Uhuru Administration

The ascendancy of the Uhuru administration to power took place in the background of an ongoing case against both President Uhuru Kenyatta and his deputy William Ruto at the ICC in The Hague, Netherlands. The two were accused of committing crimes against humanity by the ICC Chief Prosecutor Louis Moreno Ocampo. The case was linked to the 2007/2008 PEV, in which more than 1000 Kenyans had been killed following the disputed election of late 2007.[1] In responding to the crisis, international mediation had led to adoption of the National Accord by PNU and ODM, the two parties involved in the electoral dispute. One of

[1] K. Ngotho, 'Instigators'; Wanga, 'Chaos'.

the key planks of the Accord was investigation and punishment of the key suspects involved in perpetrating the PEV. To undertake the investigation, a CIPEV, chaired by Justice Philip Waki of the Kenya High Court was set up.[2]

The CIPEV came up with a list of influential individuals suspected of bearing the greatest responsibility for the PEV. Two of the most high-profile suspects were Uhuru and Ruto. The CIPEV recommended that the two along with four other listed suspects be prosecuted either through a special judicial mechanism constituted locally by the National Assembly, or by the ICC, in case the National Assembly failed to set up the local mechanism. The National Assembly failed to enact the mechanism, leading to the ICC taking over the case against the listed suspects.[3] Uhuru and Ruto responded to these developments by declaring their interest in the country's presidency. They subsequently merged their campaigns and mobilised popular support for their joint candidature in the 2013 presidential election. They largely built their campaign around the rejection of the ICC cases.[4]

The candidature of Uhuru and Ruto attracted litigation from at least one CSO, which petitioned the High Court on account of Chapter 6 of the Constitution. In the petition, the CSO argued that as suspects at the ICC in an ongoing case of crimes against humanity, Uhuru and Ruto were not qualified to run as candidates in the country's elections. Furthermore, Ruto had a pending case at the High Court, in which he was accused of grabbing land belonging to one Adrian Muteshi, a farmer who had been displaced from his property in Uasin Gishu at the height of the PEV.[5] Whereas the land grabbing case against Ruto was resolved by having Ruto return the land back to the farmer, the petition against Uhuru and Ruto on the other hand was dismissed, with the High Court reiterating that the two were innocent until proved guilty.[6] Based on the ruling, the two went ahead and participated in the elections from which

[2] Wanga, 'Chaos'.
[3] S. Brown and C.L. Sriram, 'The Politics of Criminal Accountability for Post-Election Violence in Kenya', *African Affairs* III, No. 443 (2012): 1–11; M. Wangari, 'Report reveals why Kenya ICC cases were bungled', *Daily Nation*, 27 November 2019, 23; V. Achuka, 'Gicheru coordinated scheme to influence witnesses in Ruto's case', *Sunday Nation*, 8 November 2020, 22; J. Gondi, 'The role and interaction between the Pre-Trial Division and the Prosecutor of the ICC in seeking justice for Victims', *Rule of Law Report* (Nairobi: The Kenyan Section of the International Commission of Jurists [ICJ Kenya] 2008): 119–135; Songa, *Transformation*, 17–25; Menya, 'Khan'.
[4] M. Mwale, 'Black groups challenge the ICC', *The New African*, No. 520 (2012): 20; Lower, 'Unshakeable Elites', 18–21; Wangari, 'Bungled'; J. Kamau, 'Paul Gicheru: The untold story of the man facing trial at The Hague', *Sunday Nation*, 25 July 2021, 23.
[5] H. Kimuyu, 'Muteshi, man who took on DP Ruto in land grabbing case, dies', *Daily Nation*, 28 October 2020, 9.
[6] International Crisis Group, 'Kenya after the elections', *Policy Briefing*, No. 94 (Nairobi: International Crisis Group, 2013), 9–11.

they emerged victorious and became president and deputy, respectively. With their ascendancy to power, their main focus became clearing their names at the ICC. This focus determined how the new administration interacted with the rule of law terrain in the country.

The fight against the ICC cases led to official hostility towards local institutions which could provide support to the cases. The new administration instituted a repressive environment against not only those institutions it accused of having contributed to the ICC cases against the new President and his deputy, but also against official checks and balances institutions which could hold it to account. The institutions most affected by this repressive environment were the CSOs, particularly those engaged in good governance campaigns.

Constitution and the pre-'Handshake' Uhuru Administration

The repressive environment took place against a background of the new Constitution which had not just strengthened traditional checks and balances institutions consisting of parliament, the judiciary, the anti-corruption commission, the political opposition and the electoral management system, but had also introduced new institutions such as the CIC, the DPP and the CAJ among others. In particular, the Constitution had shifted significant power over at least four critical functions of the state away from the national executive. First, it had created county governments and delegated to them the authority to develop the subnational level of the country, thus removing the power which the national executive had wielded on the ground.

The second area was in the judiciary, where the executive had lost the power to appoint judicial officers to the newly established JSC.[7] The third area in which the national executive had lost power was within the security agencies, particularly the National Police Service. Two key institutions had been introduced by the Constitution to replace the executive in managing the Service. These were the National Police Service Commission (NPSC) and the IPOA.[8] While the NPSC was to be constituted independent of the President and was expected to manage the operations of the service, the IPOA carried out investigations on unprofessional conduct among officers. The chairpersons of the Commission were to be chosen through a competitive process presided over by a multi-stakeholder panel appointed by the President, comprising of a representative each from the Cabinet, the Public Service

[7] D. Ally, 'A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa', *Athens Journal of Law* 2, No 3 (2016): 141–148.
[8] Kibisu Kabatesi, 'Jubilee erodes key institutions', *The Star*, 22 December 2017, 11.

Commission (PSC), the KNCHR, the judiciary and the National Gender and Equality Commission (NGEC). The NPSC was expected to hire the Inspector General of Police (IGP) and his/her two deputies.[9]

The changes to the Police Service which the new Constitution reinforced built on a long process of reforming the institution which had commenced earlier under the Kibaki administration. For instance, in 2004, the Kibaki administration had introduced community policing as part of reforms for the police service. This initiative intensified after the 2008 PEV, with three distinct initiatives, which were the findings of the CIPEV report of October 2008; the report of the UN Special Rapporteur on Extrajudicial Executions under Philip Alston in May 2009; and the National Taskforce on Police Reform, also called the Ransley Taskforce, chaired by Justice Philip Ransley in August 2009.[10]

The final significant function over which the executive lost power was the country's budgetary process. The new Constitution created a triad consisting of the national Treasury, the Office of the Budget Controller and the Commission for Revenue Allocation. The three institutions were expected to manage the country's budget with little executive interference. Together, the constitutional changes provided for a significant focus on the accountability of the new administration, even as the administration attempted to institute a hostile environment against accountability.

The new administration's response towards the constitutional changes was characterised by two main approaches. On the one hand, it implemented a few of the constitutional provisions it was comfortable with. On the other hand, it ignored and reverted to amending the provisions it was uncomfortable with. The latter case happened especially in its relationship with the security agencies, the judiciary, the county governments and the new constitutional commissions and independent bodies. It was also exhibited in the administration's reluctance to implement a gender affirmative action which required that no more than two thirds of appointments in public office are of one gender.[11]

The first set of institutions which faced significant amendments under the Uhuru Kenyatta administration were in the security sector. The administration showed a great desire to revert

[9] Ibid.
[10] Furuzawa, 'Police Reforms', *Journal of International Development and Cooperation*, 51.
[11] Amnesty International, 'Katiba at Ten: Distressed Yet Defiant – A Citizens' Scorecard on the First Decade', 2020, 8; S. Kiplagat, 'Presidency, MPs are cherry-picking laws to enact: Chief Justice Maraga', *Daily Nation*, 6 June 2019, 2; Y. P. Ghai, 'History of Bomas Constitution: A sad story', *Daily Nation*, 19 September 2020, 24.

the control of the security agencies into the hands of the executive. Its first two targets for amendments in the sector were the National Police Service (NPS) and the National Intelligence Service (NIS). Deploying its majority in parliament, the Uhuru administration made extensive amendments to the initial constitutional provisions on the NPSC by enacting the National Police Service Act of 2014, which reversed the powers of hiring the IGP and the two deputy IGPs from the NPSC and redeployed them back to the President.[12] By the time of the recruitment of Hillary Mutyambai as Kenya's third IGP in 2019, recruitment of senior police officers had fully reverted to the President. The influence exerted on the NPSC by the executive was so intense that Johnstone Kavuludi, the first NPSC chairman admitted that he constantly had to consult the President in running the Commission.[13]

Further amendments to the NPS were lined up through a draft Police Service Act (Amendment) Bill of 2019. The proposed law sought to entirely eliminate the powers of both the NPSC and the IGP in managing the police service. Under the law, a new management structure, the National Government Administrative Officers (NGAOs) would be created. The structure would then become responsible for the management of police officers in the counties, rather than the IGP and the NPSC. The structure was aimed at consolidating further the control which the executive enjoyed over the National Police Service.[14]

The administration's amendments had two main effects on the Service. First, they disrupted ongoing reforms in the Service. As part of its mandate under the new Constitution, the NPSC had been expected to reform the Service and rid it of the negative image which it had cultivated over the years. In line with this mandate, the NPSC commenced a vetting exercise with the intention of removing from the Service police officers deemed unfit to serve due to professional misconduct. By 2018, the NPSC had vetted a total 5,993 officers, of which 273 were sacked.[15] However, the vetting exercise was undermined through both contestation in law courts and by the interference caused by the amendments which reduced the NPSC's mandate over the NPS. As a result, the vetting exercise and reform of the Service stalled,

[12] 'Rule of Law', *Power Breakfast Show*, Citizen TV, YouTube video, 15 July 2014, 24:31, Power Breakfast Interview: Rule of Law - YouTube.
[13] W. Menya, 'Recruitment farce seals President Kenyatta's grip on police', *Sunday Nation*, 21 January 2018, 8; E. Ondieki, '10 to attend interviews for police team boss Monday', *Sunday Nation*, 27 January 2019, 4.
[14] K. Maina 'Crafty State officers plot to take control of police', *The Standard*, 2 November 2019, 6.
[15] Maina, *State Capture*, 34–35.

leaving it as one of the institutions which remained unchanged, even with the institutional reforms demanded by the new Constitution.[16]

Secondly, although the structure of the Service provided for by the Constitution had largely been retained, the amendments threatened to alter it. The Constitution had provided for the merger of the Administration Police Service, the DCI and the NPS into one command structure under the IGP. Using the need to align the structure to the new devolved structure of government, the amendments introduced a subnational police structure at the regional, county and sub-county levels, and attempted to have this new subnational structure report to a new command, away from the IGP. [17]

The second security agency to be targeted for control by the Uhuru administration was the National Intelligence Service (NIS). Almost immediately after its ascendancy to power, the administration replaced Michael Gichangi, the NIS director inherited from the preceding Kibaki administration, with Philip Kamere. It then deployed the NIS on assignments the President deemed as delicate and important. These included fighting corruption in several government agencies, managing political rivals, setting up of the national land information system, lifestyle audits of public officers and tracking suspected poachers.[18] However, the institution remained opaque in its operations and courted controversy in some of the assignments it undertook. One such assignment was being deployed by the President to vet judges submitted by the JSC to the presidency for appointment. This was beyond the NIS mandate and was seen as part of processes the executive was deploying to undermine judicial independence.[19]

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[16] T. Kagwe, 'The "Inspector Fisi" exposé: Failure by EACC and NPSC to stem corruption', *The Star*, 19 July 2017, 8; Y. Kazeem, 'Nigeria, DR Congo, Kenya and Uganda have the world's worst police forces', *Quartz Africa*, 11 November 2017 https://qz.com/africa/1127083/nigeria-kenya-uganda-dr-congo-and-pakistan-police-are-the-worlds-worst, (accessed on 8 January 2023); 'Naming and shaming won't end corruption', *Daily Nation*, 20 November 2019, 14; 'Stop the police brutality', *Daily Nation*, 26 June 2020, 14; W. Kipkemoi and P. Mwakio, 'Horror as soldiers force locals to swim in sewage', *The Standard*, 21 October 2019, 3; D. Mwere, 'Senators question Ipoa as extrajudicial killings increase', *Daily Nation*, 5 March 2020, 4; 'The bad apples in the police service must go', *Daily Nation*, 31 January 2020, 14; 'Get to the bottom of bungled pastor case', *Daily Nation*, 9 May 2018, 14; 'Police force must rid itself of brutal image', *Daily Nation*, 16 February 2019, 14; N. Komu, 'Villages in central Kenya still dread return of Mungiki', *Daily Nation*, 26 August 2020, 5; K. Guyo, 'Referendum needed to curb abuse of police powers', *Daily Nation*, 26 April 2021, 14; V. Achuka, 'How constable in Sh26m forfeiture shuffled bribe cash between accounts', *Daily Nation*, 5 November 2021, 6; M. Wambui, 'Police officers leading perpetrators of violence: Study', *Daily Nation*, 16 August 2020, 5; V. Oluoch, 'Near-record police killings mark a bloody year in law enforcement', *Daily Nation*, 25 June 2020, 2.

[17] 'Appointments good sign in police reforms', *Daily Nation*, 4 January 2019, 14.

[18] 'Spies we can Trust? The Men behind the Man', *The Nairobi Law Monthly*, 10, No. 9 (2018): 30–35.

[19] N. Gisesa, 'How NIS Regained Uhuru's Trust and Confidence', *Sunday Nation*, 19 January 2020, 4; N. Gisesa, 'Eyes on President Kenyatta as Spy Chief's Term Ends this Month', *Sunday Nation*, 4 August 2019, 4;

Checks and Balances under the pre-'Handshake' Uhuru Administration

Judiciary

At the commencement of the Uhuru administration's tenure, the judiciary was in a state of transformation, ignited by the 2010 Constitution. Although the transformation could be traced as far back as the Kibaki era's 'radical surgery', it intensified under the Uhuru administration. This was mainly due to three factors, namely the new Constitution, the appointment of Willy Mutunga as Chief Justice and the replacement of Mutunga by David Maraga.[20]

The new Constitution set in motion judicial transformation by making two far-reaching demands. First, it required the vetting of judicial officers through a process regulated by a properly constituted legislation. This led the National Assembly to enact the Vetting of Judges and Magistrates Act of 2011. The Act facilitated a water-tight process of reforming the judiciary without disruptive litigation which the 'radical surgery' had faced. Secondly, the Constitution demanded the resignation of the Kibaki-era Chief Justice Evans Gicheru, and his replacement through a competitive and transparent process led by a new and independent entity, the JSC. This led to the appointment of Willy Mutunga as the first Chief Justice under the new constitutional dispensation.

As Chief Justice, Mutunga deepened judicial transformation through a strategy called *The Judiciary Transformation Framework, 2012–2016* launched on 31 May 2012. The strategy's main focus was how to reduce the executive's influence on the judiciary. It identified seven goals, four pillars and 10 result areas which would help the institution achieve this focus.[21] Judicial transformation continued under the tenure of David Maraga, Mutunga's successor as the second Chief Justice under the new Constitution. Appointed in October 2016, Maraga improved on Mutunga's strategy, coming up with *Sustaining Judicial Transformation: A*

N. Gisesa, 'With New Mwathethe Job, Military now Controls Three Key Sectors', *Daily Nation*, 5 November 2020, 5.

[20] G. Kegoro, 'Why Maraga Might be the Stone that Builders Rejected', *Sunday Nation*, 3 September 2017, 13.

[21] O. C. Kerubo, 'Factors Influencing Implementation of Judiciary System Projects in Kenya: Case of the Judiciary Transformation Framework', MA Thesis, University of Nairobi, 2014, 8–10; M. Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015: Innovations for Successful Societies'. https://successfulsocieties.princeton.edu/sites/g/files/toruqf5601/files/MG_OGP_Kenya.pdf (accessed on 17 January 2021); P. Kameri-Mbote and M. Muriungi, 'Internal Mechanisms for Ensuring the Independence and Accountability in the Judiciary in Kenya', in *Judicial Accountability in the New Constitutional Order*, ed. Jill Cottrell Ghai (Nairobi: The International Commission of Jurists Kenyan Chapter, 2016), 86–88; Mbondenyi, 'Unclogging', 341–342; W. Mutunga, 'Dressing and Addressing the Kenyan Judiciary: Reflecting on the History and Politics of Judicial Attire and Address', *Buffalo Human Rights Law Review* 20 (2013–2014), 126–127; Mwangi, 'Asset'.

Service Delivery Agenda, 2017-2021. However, there were two main differences between the Mutunga and Maraga transformation processes. Maraga put more focus on corruption within the judiciary and reform of the criminal justice system to update it in conformity with the new Constitution. He also reintroduced white wigs and the red robes which had been abandoned under Mutunga's tenure.[22]

The transformation processes happened in a background of evolving relations with the executive. During the tenure of Mutunga, the judiciary largely avoided confrontation with the executive. It made at least two significant rulings which were in favour of the Uhuru administration. The first ruling involved the High Court verdict which allowed Uhuru Kenyatta and William Ruto to vie as candidates in the 2013 election, in spite of the charges they were facing. The ruling called to question the judiciary's commitment to enforcing the new Constitution, particularly Chapter Six on leadership and integrity, which demanded higher ethical standards among those vying for leadership in the country. In responding to this concern, the judiciary shifted the blame to parliament, accusing it of failure to enact legislation that could facilitate the implementation of the constitutional provisions of Chapter Six.[23]

The second ruling which favoured the Uhuru administration involved the Supreme Court's verdict on the 2013 presidential election petition. The ruling validated the 2013 election, asserting that the election had been carried out in accordance with the law. It allowed the administration to ascend to power, although critics feared that it exhibited continuing judicial deference towards the executive, even in the face of the new Constitution.[24]

With the two favourable rulings, the executive and the judiciary maintained a cordial relationship. This was to continue during the whole of the Mutunga tenure and much of the early Maraga tenure. It was only broken towards the 2017 election, mainly over two issues, namely the judiciary's involvement in preparation for the 2017 election and attempts by the

[22] D. Maraga, 'Changing structure to enhance the delivery of judicial services', *Daily Nation*, 19 November 2018, 14; P. Mwangi, 'All What Chief Justices Have Offered On Fighting Graft in Judiciary Is Lip Service', *Daily Nation*, 27 January 2019, 14; J. Wangui, 'Why Maraga's bid to reform justice system has flopped', *Daily Nation*, 17 June 2020, 16; W. Khobe, 'Chief Justice David Maraga Embraces Colonial Relic and Symbol of Judicial Impunity', *The Platform*, 16 November 2016, 24–26.

[23] K. Kimanthi, 'Land of anarchy as MPs break laws at will', *Daily Nation*, 27 May 2019, 7.

[24] K. Kanyinga and C. Odote, 'Judicialisation of politics and Kenya's 2017 elections', *Journal of Eastern African Studies* 13, No. 2 (2019): 240; J. Harrington and A. Manji, 'Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013', *Journal of Eastern African Studies* 9, No 2 (2015): 175–192; W. Menya, 'Willy Mutunga: How ruling against Raila Odinga almost cost me my family, friends', *Sunday Nation*, 24 October 2021, 16–17; Sihanya, Interview.

Uhuru administration to use Maraga's appointment as a campaign gimmick in the election. In terms of the judiciary's involvement in the preparations for the 2017 election, the institution intervened in a number of cases brought to it by the political opposition in which the opposition litigated against measures which it deemed were bound to favour the incumbent Uhuru administration during the election. The judiciary agreed with some of the opposition's claims, making rulings which were deemed to be against the administration.

One of the most important rulings was the so-called Maina Kiai case of 2017, in which the High Court ruled that results at polling stations were final. The ruling was meant to deal with the perception that electoral officials tampered with results at the central tallying centres away from the polling stations. It was later affirmed by the Court of Appeal.[25] In response to the heightened judicial intervention in the election, some senior functionaries in the Uhuru administration attacked the judiciary and issued warnings against the institution.[26]

As for using Maraga's appointment as a campaign gimmick, this took place in a campaign rally in the larger Kisii area where President Uhuru Kenyatta, while campaigning for re-election and in an attempt to win votes among Maraga's Gusii community, insinuated that his administration had influenced Maraga's appointment as a goodwill gesture towards the community. In response, Maraga denounced the claim and maintained that his appointment as Chief Justice was based on merit, and not on where he came from.[27] Overall, however, the judiciary and the executive held onto a working relationship, until the second term of the Uhuru administration in aftermath of the 2017 election.

[25] W. O. Khobe, 'Protecting the Integrity of the Electoral Process: The Promise of the *Maina Kiai* Judgement', *Kabarak Journal of Law and Ethics* 3 (2018): 1–9; D. O. Munabi, 'Judicialisation of "Mega" politics in Kenya: Contributor to Democratisation or Mere Recipe for Backlash?' in *Reflections on the 2017 elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya,* ed. James Gondi (Nairobi: The Kenyan Section of the International Commission of Jurists (ICJ Kenya), 2018), 61–70; W. O. Khobe, 'The State of Judicial Independence in Kenya – Reflections from the 2017 elections', in *Reflections on the 2017 elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya,* ed. James Gondi (Nairobi: The Kenyan Section of the International Commission of Jurists (ICJ Kenya), 2018), 5–32; E. Z. Ongoya, 'Protecting the Integrity of the Electoral Process, or Obfuscating the Electoral Process?' *Kabarak Journal of Law and Ethics* 3 (2018): 11–19; C. Waitara, 'The Judicialisation of Politics in Kenya', in *Reflections on the 2017 elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya,* ed. James Gondi (Nairobi: The Kenyan Section of the International Commission of Jurists [ICJ Kenya], 2018), 38–48.

[26] 'Damned if they do, and damned if they don't: Judiciary's dilemma', *Daily Nation,* 24 July 2017, 8–9; M. Mutua, 'The Executive is hell-bent on killing judicial independence', *Sunday Standard,* 16 July 2017, 23.

[27] 'CJ David Maraga warns politicians against attacking Judiciary', *Daily Nation,* 2 August 2017, 4.

Parliament

Distinct from the relationship with the judiciary, the Uhuru administration's relationship with parliament was one of executive dominance. The Constitution had introduced significant changes which were aimed at bolstering parliamentary independence. One of these changes was the introduction of a bicameral arrangement consisting of the Senate and the National Assembly. Further changes included instituting the position of the Leader of Majority, who became leader of government business in parliament. The new position eliminated the direct participation of the executive in parliament, in line with the principles of separation of powers between parliament and the executive. In addition, parliament instituted committees, through which most parliamentary business, especially the oversight function, was conducted.

The changes boosted parliamentary performance, with the committees being at the forefront in delivering on parliamentary business. This included carrying out oversight investigations on executive conduct on a wide range of public affairs, including the Westgate terror attack, corruption and misuse of public funds and in vetting executive appointees.[28] But parliament still faced a number of challenges, even with improvement in performance due to the reset instituted by the Constitution. The first challenge consisted of supremacy fights between the Senate and the National Assembly, with the speakers of both houses jostling over aspects such as counties, devolution, election, vetting of public officials and finance bills.[29]

The second challenge involved the committees through which much of parliamentary business was conducted, which posed at least four problems. First, they acquired a gatekeeper role in public affairs, and some of its members used this influence to solicit for private gains, thus fuelling parliamentary corruption. Part of the reason why the committees acquired the

[28] Republic of Kenya, *Report of the Inquiry into Alleged Importation of Illegal and Contaminated Sugar into the Country, 2018,* Nairobi: The National Assembly, 2018; S. Owino, 'Elsewhere, MPs don't represent clients in court', *Sunday Nation,* 15 December 2019, 13; I. Oruko, 'Covid millionaires scandal: Senate team recommends investigation into CEO, five others', *Daily Nation,* 30 March 2021, 7; G. Warigi, 'Help! Parliamentary committees are now disorderly and gross', *Sunday Nation,* 29 July 2018, 31; D. Opiyo, 'President's dilemma in naming commission to probe Westgate attack', *The Star,* 26 October 2013, 6; 'Commission of inquiry that never was', *Sunday Nation,* 20 September 2014, 22–23; A. Oketch and S. Owino, 'How Uhuru's MES health care scheme went to the dogs', *Sunday Nation,* 4 October 2020, 6–7; 'Senate must come clean on MES investigations', *Daily Nation,* 25 September 2020, 21; D. Mwere, 'How Jacob Juma threatened to sell public assets in maize fraud', *Daily Nation,* 25 June 2020, 31; N. Gisesa and S. Kiplagat 'It's 39 years or over Sh1.5bn for Waluke, Wakhungu', *Daily Nation,* 26 June 2020, 2; 'Let ruling be turning point in graft fight', *Sunday Nation,* 28 June 2020, 21; W. Githae, 'Crackdown on State critics raises eyebrows', *Sunday Nation,* 27 August 2017, 7.

[29] E. Omari, 'Speakers leave different legacies as bicameral Parliament folds up', *Daily Nation,* 15 June 2017, 9.

gate keeper role was through duplicating the roles of other oversight institutions, especially the DCI and the DPP. This forced the speaker of the National Assembly to direct that the committees shall not carry out parallel investigations when DCI and DPP were working on the same issue. Thirdly, the committees often lacked quorum. Related to this was the problem of committee members with dual mandates, which often caused a conflict of interest. This was the case, for instance, with Senators and MPs who acted as private lawyers for public officials facing investigation by parliamentary committees in which the same Senators and MPs participated.[30]

The biggest weakness facing the restructured parliament was the ties it cultivated with the executive. These ties made parliament act as an extension of the executive where, save for one rare occasion when the National Assembly refused to endorse an executive appointee, most of the decisions made by parliament were a reflection of the wishes of the executive. The executive retained influence in both houses through mobilising along political party lines and in supporting the election of pliant speakers who would favour it. Using this influence, the executive then forced through parliament a number of controversial initiatives.[31]

One such initiative involved proposed amendments to the Constitution to enact laws to roll back most of the rights and freedoms which the Constitution had secured for Kenyans. These included the Statute Law (Miscellaneous Amendments) Bill, the Election (Amendment) Bill and the Security Bill, 2013, all aimed at giving the executive greater and direct control over the affairs of the CSOs, the political opposition and the media. The amendments were justified as necessary to overcome security threats which the country was facing due to terrorist attacks.

However, they were heavily contested in and out of parliament. Within parliament, debating the amendments was so chaotic that at least one opposition MP was suspended from the House. Outside, riot police ringed parliament to keep away demonstrators who had vowed to invade the house during the passage of the controversial laws. Eventually, sections of the laws were overturned by the High Court which ruled them unconstitutional.[32] The whole

[30] 'House committees forum is a good idea', *Daily Nation,* 1 November 2019, 21; Owino, 'Elsewhere'; Warigi, 'Help!'; M. Kakah, 'Senators representing Sonko in conflict of interest: Prosecution', *Daily Nation,* 11 December 2019, 7.
[31] I. Ramas, 'Axis of Impunity', *The Nairobi Law Monthly* 5, No. 10 (2014): 22-23; Njonjo, 'Westminster'; Omari. 'Bicameral'; A. Kareithi, 'Speakers who were consigned to political dustbins', *The Standard,* 22 September 2021, 12.
[32] Omari, 'Bicameral'.

episode indicated the continuing influence which the executive enjoyed over parliament, and which it could deploy to subvert the rule of law in the country.

Other Checks and Balances Institutions

The executive's relationship with the rest of the horizontal accountability institutions was of outright domination. Whereas the relationship with the judiciary and parliament required careful navigation through planting of pliant pro-administration personnel in the two institutions due to the visibility which the institutions enjoyed, the relationship with institutions such as the Auditor-General, the EACC, the CAJ and the DPP among others required no such careful navigation.

The Auditor General was perhaps the institution which had the most strenuous relationship with the Uhuru administration, especially in the administration's initial years in power. Although the Auditor General consistently produced audit reports that indicated massive plunder of public resources by administration functionaries, these reports were largely ignored.[33] The height of tension between the administration and the Auditor-General's office was reached when the President himself directed a personal attack against the Auditor-General over the latter's audit of money the executive had borrowed through the Eurobond scheme. Whereas the executive had claimed that it had allocated the borrowed sums in the country's development budget, the Auditor General's reports indicated that there was no trail indicating how the money had been utilised.[34]

In the aftermath of the President's dressing down, parliament attempted to remove the Auditor General from office. It came up with a Public Audit Bill 2014, through which it sought to scuttle the powers of the Auditor General by setting up an Audit Advisory Board whose membership included the Attorney General and the Chairperson of the Public Service Commission (PSC) and whose mandate included taking over the personnel recruitment function from the Auditor General. Further, parliament instituted investigations against the Auditor General with the intention of removing him from office. However, these attempts were scuttled by the High Court, which ruled against them.[35]

[33] 'By not acting on audit reports, State is setting dangerous trend', *The Standard,* 9 December 2018, 16.
[34] P. Wafula and J. Ombuor. 'Auditor silenced: What did Ouko find on the Eurobond investigations that shut him up?' *The Standard,* 9 December 2018, 4–5.
[35] P. Leftie. 'EACC wants Auditor General charged over Sh100m tender', *Sunday Nation,* 8 January 2017, 4.

The hostility against the Auditor General by the executive silenced the Auditor General from carrying out any further audits of the Eurobond scheme. Due to the difficult working environment, Edward Ouko, the first Auditor General under the new Constitution, called for additional protection for the office from interference by the executive. The interference continued unabated, however, with the executive being heavily involved in the appointment of Ouko's replacement in 2019.[36]

As for the EACC, the nature of domination the institution endured under the Uhuru administration was more direct. Having existed previously as the Kenya Anti-Corruption Commission (KACC), the EACC was one of the institutions which were extensively strengthened by the 2010 Constitution. The Constitution rebranded it the Ethics and Anti-Corruption Commission (EACC) and entrenched it as a constitutional commission with a broader mandate of enforcing Chapter Six of the Constitution. The changes were expected to support the independent functioning of the institution, and help it advance the mission of investigating corruption cases in the country.

The Uhuru administration added further changes to the anti-corruption architecture by instituting the National Task Force on Anti-Money Laundering in 2015. The membership of the task force included the National Treasury, the Assets Recovery Authority, the EACC and the Financial Reporting Centre.[37] The administration added two further laws meant to enhance the war against corruption. These were the Leadership and Integrity Act of 2015 and the Bribery Act of 2016.[38]

The changes did not improve the performance of the EACC. The institution remained hamstrung by leadership challenges, with a quick change of commissioners between 2010 and 2018. Having succeeded Aaron Ringera, the long-serving director under the Kibaki administration in 2009, lawyer P. L. O. Lumumba was himself sent home following the enactment of the EACC Act 2011 which disbanded the KACC. He was replaced by Mumo

[36] 'Time to give teeth to chief auditor's office', *Daily Nation*, 30 August 2019, 21; Githae, 'Crackdown'; V. Achuka and P. Wafula, 'Ouko wants Constitution changed to clip president's powers', *Daily Nation*, 28 August 2019, 7; J. Kisero, 'We want stronger Controller of Budget to clip Treasury's claws', *Daily Nation*, 19 November 2019, 23; D. Mwere, 'MPs approve nomination of Gathungu as auditor-general', *Daily Nation*, 15 July 2020, 5; S. Owino, 'President's office "frustrating" efforts to hire Auditor-General', *Daily Nation*, 14 March 2020, 6; W. Menya, 'Auditor-General's baptism of fire in quest to clear backlog', *Sunday Nation*, 1 November 2020, 6.

[37] C. Omulo, 'Kenya has recovered Sh3bn graft money in 2 years: AG Kihara', *Daily Nation*, 4 February 2019, 6; D. Wesangula and J. Ngetich, 'Panic in government, counties as crackdown on graft intensifies', *The Standard*, 7 July 2018, 8.

[38] Okiri, Ngugi, & Wandayi, 'Integrity', 141–142.

Matemu who served as the first Chief Executive Officer of the newly reconstituted EACC. However, Matemu's tenure at the EACC only lasted up to 2015, when he, along with his Vice Chair and one Commissioner resigned. His replacement was Philip Kinisu who was appointed in November 2015. By August 2016, however, Kinisu had been forced out of the institution due to issues of conflict of interest. Kinisu was replaced temporarily by Halakhe Wako who served as acting Chief Executive Officer until a substantive appointment of a new Chief Executive Officer in 2018.[39]

In a summit organised by the executive on 18 October 2016 to review the performance of checks and balances institutions, the EACC was one of the institutions blamed for continued high level corruption in government. During the summit, the executive blamed the institutions for not doing enough to fight corruption under the administration. In defending the EACC, acting head Halakhe Wako shifted the blame to the office of the DPP. He claimed that the EACC relied on the DPP to prosecute cases of corruption that the institution submitted to the DPP. The DPP on the other hand blamed the EACC for submitting cases which lacked evidence that could be presented in the law courts.[40]

The same direct executive influence on the checks and balances institutions was witnessed in the relationship between the executive and the office of the DPP. Perhaps more than the EACC, the office of the DPP had received a significant recalibration under the new Constitution. Under the Independence Constitution, the Office of the Directorate of Public Prosecutor had been subsumed under the Attorney General's office, with AGs enjoying both the powers of the AG and those of the public prosecutor. The 2010 Constitution separated the two functions by setting up an office of the DPP that was not just independent of the AG, but also of the executive. Whereas the AG was made a legal advisor of the government serving at the pleasure of the executive, the office of the DPP was made an independent office with security of tenure and an answerability towards parliament, rather than the executive. Its core mandate consisted of three main roles, namely directing the Inspector General of Police to

[39] Maina, *State Capture*, 34–35; Okiri, Ngugi and Wandayi, 'Integrity', 131–152; J. Okoth, 'The Leadership and Integrity Chapter of the 2010 Constitution of Kenya: The Elusive Threshold', in *Human Rights and Democratic Governance in post-2007 Kenya: A post-2007 Appraisal*, 275–277.
[40] M. Nyamori, 'President Uhuru roasts top officers over holes in corruption war', *The Standard*, 19 October 2016, 2.

investigate unlawful conduct, instituting and/or presiding over criminal cases in the law courts and terminating ongoing cases in line with laid down rules.[41]

The performance of the reconstituted office of the DPP, much like that of the EACC, remained below public expectations. This was mainly due to two factors. First, the appointment of the first DPP under the new arrangement was clouded in controversy, with the executive under the Kibaki administration seeking to retain control of the office when the President appointed Kioko Kilukumi as DPP. However, the appointment was reversed and a new process of appointment controlled by parliament initiated. The parliamentary process itself was bogged down in controversy over the suitability of the eventual nominee, Keriako Tobiko, with sections of the parliamentary vetting committee which scrutinised the nomination questioning the nominee's integrity.[42] Secondly, the performance of the office in dealing with impunity across the country remained dismal, with corruption and economic crimes increasing exponentially under Tobiko's watch. This continued until his executive-induced premature departure from office in March 2018.[43]

Direct executive interference extended to all other new checks and balances institutions created by the Constitution. Institutions such as the Salaries and Remuneration Commission (SRC), the National Cohesion and Integration Commission (NCIC), the KNCHR, the National Gender and Equality Commission (NGEC), the National Police Service Commission (NPSC), the Public Service Commission (PSC), the Teachers Service Commission (TSC), the Commission on Administrative Justice (CAJ), the National Land Commission (NLC), the office of the Controller of Budget and the Commission on Revenue Allocation (CRA) were mostly unable to demonstrate the capacity to operate independently from the executive.[44] The CAJ, under its first chairperson, former LSK council member Otiende Amollo, was perhaps the only institution which attempted to exhibit some independence. It did this by rejecting to share physical office space with the Deputy

[41] J. Ambuka, 'DPP Keriako Tobiko must reassert his independence', *The Standard*, 9 October 2015, 19.
[42] 'Kibaki nominates CJ, AG amid spat', *The Standard*, 29 January 2011, 1; 'Court blocks Kibaki appointees', *Daily Nation*, 3 February 2011, 2; 'MPs endorse Mutunga, Barasa and Tobiko', *The Standard*, 16 June 2011, 2.
[43] W. Githae, '"nolle prosequi" have characterised his six years in office but has Tobiko delivered on his mandate?' *Sunday Nation*, 29 October 2017, 25; J. Ambuka, 'DPP Keriako Tobiko must reassert his independence', *The Standard*, 9 October 2015, 24.
[44] 'Citizens should stop slide into dictatorship', *Daily Nation*, 4 June 2020, 21; Kabatesi, 'Jubilee'; P. Lang'at. 'Why top officials' hands are tied in war against corruption', *Sunday Nation*, 25 June 2017, 23; 'IEBC lacks power to enforce chapter six', *Daily Nation*, 3 June 2017, 21.

President's office and litigating against executive decisions which affected CSOs. The rest of institutions were mostly ignored by the executive.[45]

As a demonstration of the direct control the executive enjoyed over the institutions, the Uhuru administration placed the institutions, along with others including the NPSC, the PSC, the JSC, the IEBC, the office of the DPP and the EACC under direct executive supervision by various ministries and state departments in a gazette notice in May 2020. Although this was later reversed by High Court Judge James Makau who declared the move as unconstitutional in a case litigated by the LSK, it showed the direct influence which the executive enjoyed over the new institutions.[46]

A similar disregard for checks and balances by the Uhuru administration was extended to pending National Accord items which the administration inherited from the preceding Kibaki administration. One such item was the TJRC process. The process had been one of the issues from the 2008 National Accord's four agendas aimed at investigating past government impunity. The Uhuru administration ascended to power as the process was concluding. The administration used its influence on the Commission to force through alterations to the Commission's final report, expunging sections touching on land injustices perpetrated during the administration of Kenya's first president Jomo Kenyatta.[47] Based on the report's recommendations, in 2015 the Uhuru administration announced that government would set up a Kshs.10 billion restorative fund to compensate victims of state brutality. However, by the end of the tenure of the administration, no such fund had been set up to compensate victims of state brutality.[48]

County Governments under the Uhuru Administration

County governments as new entities created by the 2010 Constitution posed a different kind of challenge to the Uhuru administration altogether. The relationship between the administration and the subnational governments commenced with a clear intention on the part

[45] R. Rajab, 'First Ombudsman chair exists early with "99%" success', *The Star*, 17 November 2016, 7; J. Ndunda, 'Ombudsman has resolved 83% of complaints in six years', *The Star*, 15 November 2017, 5.
[46] 'Citizens', *Daily Nation*; J. Wangui, 'Court suspends Uhuru's Executive Order on independent commissions', *Daily Nation*, 3 August 2020, 4; 'Independence of Commissions must be protected jealously', *Sunday Nation*, 8 July 2018, 21.
[47] Slye, *TJRC*, 23–48.
[48] Asaala and Dicker, 'Truth-seeking', *Africa Nazarene University Law Journal*, 147–164; Musau, 'TJRC report'; N. Musau, 'Uhuru did not receive the "official and legal" version of the TJRC report', *The Standard*, 16 September 2018, 2; K.J. Kelly, 'Kenya lacks accountability for human rights abuses – HRW', *Daily Nation*, 16 January 2020, 34.

of the administration to control the governments.[49] However, this quickly morphed into accommodation when direct control proved difficult. With significant powers assigned to them by the Constitution, the county governments posed an unprecedented challenge to the national executive's powers. In particular, there were two entities provided for in the Constitution which made national executive's domination of county governments difficult. The first was the Senate, whose core mandate was the protection of devolution. It provided vigilance over how the national executive related with county governments, making sure that this was in accordance with the Constitution.

The second entity was the Council of Governors (CoG), which acted as a single entity for articulating and protecting county governors' interests. The CoG elected Isaac Ruto as its first chairperson. Although he was a prominent member of the ruling Jubilee party, Ruto became a vocal advocate for the independence of county governments, with his tenure marked by a combative attitude towards the national executive aimed at protecting the interests of the subnational entities. The quick developmental outputs from a number of county governments especially in northern Kenya also worked to mobilise popular support for the entities, thus making it unattractive for the national executive to interfere in their operations.[50]

Due to difficulties in directly controlling the county governments, the Uhuru administration exploited some of the weaknesses in the county governments in its quest for control of the subnational entities. The county governments themselves were marked by at least two major weaknesses, which exposed them to possible control by the administration. The first weakness was that the number of units which the Constitution had created were too many. This made the units almost unviable and overly dependent on the national Treasury for their survival.[51] The second weakness was rampant corruption, with the units becoming centres of runaway corruption during the first years of their operationalisation. The rampant corruption not only led to vicious and disruptive battles in counties between county assemblies and governors, but also opened up ways through which the national executive directly became involved in the affairs of the county governments in the name of fighting corruption.[52]

[49] Ramas, 'Axis', 22–23.
[50] 'Kenya after the elections', International Crisis Group, 12–14.
[51] Ghai & Ghai, '14 counties'.
[52] V. Achuka, 'EACC targets eight governors as graft probe intensifies', *Daily Nation*, 8 September 2020, 5; B. Wasuna, 'Anti-graft agency to enhance Obado charges', *Daily Nation*, 29 August 2020, 2; K. Muthoni, 'County employee deposited "suspect" money for years', *The Standard*, 23 August 2020, 6; 'Ensure Kenyans get the benefits of Constitution', *Daily Nation*, 26 August 2020, 23; M. Kinyanjui, 'Haji orders arrest of Garissa

The Uhuru administration exploited these two weaknesses in its attempt to control the county units. Using the first weakness of overdependence of the county units on the national Treasury for funds to run their operations, the administration foisted on the units debts and retrenched staff from the defunct local governments. It also forced on the county units exorbitantly priced medical equipment which had been contracted without consultation with the units.[53]

As for the second weakness of corruption in the counties, institutions such as the EACC, office of the DPP and DCI swung into action investigating the vice, undertaking lifestyle audits and arraigning a number of county officials in court on charges of corruption.[54] However, since the institutions were under the direct supervision of the national executive, their actions against county officials were often interpreted as the executive's attempts to stifle county governments. In at least one case, the Uhuru administration used a governor's poor record to instigate the creation of a new entity, the Nairobi Metropolitan Services (NMS), which took over many of the functions of the Nairobi County Government, thus lending credence to accusations of seeking to control county governments.[55]

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governor Ali Korane over misuse of Sh235m', *Daily Nation,* 10 September 2020, 2; B. Mwinzi and C. Omulo, 'How Nairobi sank into filth as graft held sway', *Sunday Nation,* 5 July 2020, 23; 'Kirinyaga graft web requires specially high skills to unravel', *Daily Nation,* 30 June 2020, 6; C. Omulo and J. Kinyanjui, 'Fresh twists in unending Dandora Stadium saga', *Daily Nation,* 6 October 2020, 4; I. Oruko, 'Witness testifies "how governor stole money and shared it out"', *Daily Nation,* 28 January 2020, 2; A. Njiru, 'Revealed: The intricate money trails in governors' graft probe', *Daily Nation,* 17 September 2020, 12; I. Oruko and G. Munene, 'Waiguru's joy over Senate win marred by new threats', *Daily Nation,* 27 June 2020, 13; W. Menya, 'Moment of truth for hundreds of county staff as audit begins', *Sunday Nation,* 8 July 2018, 2; J. Wangui and S. Otieno, 'Night in cell for Korane as plea-taking pushed in Sh233m fraud case', *Daily Nation,* 14 September 2020, 2; A. Njeru, 'Muthomi Njuki's political career facing ultimate test', *Daily Nation,* 9 September 2020, 4; R. Munguti, 'Ojaamong defends himself in graft case', *Daily Nation,* 16 July 2020, 8; 'Panic in counties as EACC lines up governors for prosecution', *Daily Nation,* 5 September 2020, 5; 'Governors wrong to shield crime suspects', *Daily Nation,* 17 December 2019, 21; D. Mwere, 'Derailing justice claims could add to Sonko troubles', *Daily Nation,* 8 January 2020, 6; P. Lang'at and H. Misiko, 'Governors declare war on NMG for graft stories', *Daily Nation,* 9 September 2020, 4.

[53] Kabatesi, 'Jubilee'; A. Oketch and S. Owino, 'How Uhuru's MES health care scheme went to the dogs', *Sunday Nation,* 4 October 2020, 5.

[54] I. Oruko, 'Agencies shut door on leaders impeached over integrity issues', *Daily Nation,* 31 December 2020, 6; B. Ojamaa, 'EACC picks out corruption loopholes in counties', *Daily Nation,* 8 September 2021, 4; J. Ochieng' 'Blow to Waititu in quest to become Nairobi governor', *Daily Nation,* 31 December 2020, 8.

[55] Menya, 'Moment of truth'; Wangui and Otieno, 'Korane'; Njeru, 'Muthomi'; R. Munguti, 'Ojaamong defends himself in graft case', *Daily Nation,* 16 July 2020, 6; 'Panic in counties as EACC lines up governors for prosecution', *Daily Nation,* 5 September 2020, 9; L. Onyango, 'Commission wants DPP to investigate five governors', *Daily Nation,* 18 July 2017, 13; 'Malombe threatens to sue Ombudsman over claim he broke law', *Daily Nation,* 19 July 2017, 11; 'Is it legal for Uhuru to take over Nairobi? Experts weigh in', *Daily Nation,* 26 February 2020, 19; N. Gisesa, 'Judge revises decision, declares NMS legit', *Daily Nation,* 19 September 2020, 3; C. Baraka, 'Kenya's Road to Dictatorship Runs Through Nairobi County', *Financial Times,* 26 June 2020, https://foreignpolicy.com/2020/06/26/kenya-road-dictatorship-nairobi-county-military-metropolitan-services-uhuru-kenyatta/, (accessed 24 July 2021).

The IEBC attracted the most deliberate and direct efforts to control it by the Uhuru administration. By the time of ascendancy to power of the Uhuru administration in August 2013, the institution had been restructured in accordance with the Constitution, with commissioners appointed through a competitive process consisting of recruitment by a multi-agency panel, vetting by parliament and appointment by the President. The changes aimed at bolstering the independence of the institution. Under these changes, the IEBC supervised the 2013 election that ended the Kibaki era and ushered in the Uhuru Kenyatta era.

The first election supervised by the reconstituted IEBC during the Uhuru Kenyatta era was in August 2017. In gearing up for the election, the IEBC undertook at least two significant measures. The first measure involved deepening the use of technology, which had commenced prior to the 2013 election in line with the recommendations of the Kriegler report of 2008. The purpose of this measure was to protect Kenya's electoral system from manipulation. The technology consisted of a biometric register, which aimed at verifying voters to ensure only eligible ones participated in the election. It also involved an electronic results transmission system aimed at eliminating delays in the transmission of results and to improve the transparency of the process starting from the polling station, through the constituency, and ultimately the national tallying centre.

The second measure involved attempts to clean up the electoral process. To this extent, the IEBC tried to bar candidates who did not meet the threshold of Chapter Six of the Constitution. In this respect, the IEBC received names of 126 aspirants from the EACC and CSOs led by Transparency International, who the two organisations wanted IEBC to be barred from the 2017 election due to issues of integrity.[56]

Despite the constitutional changes and measures meant to bolster the electoral system, the IEBC faced at least three broad challenges. The first involved distrust from the political opposition and sections of society. Although politicians across the political divide tried to work on a common position on the elections, with the main coalitions, Jubilee and CORD, forming a Joint Parliamentary Select Committee co-chaired by James Orengo and Kiraitu Murungi to address the electoral dispute resolution mechanisms, this was not enough to earn

[56] 'IEBC lacks power to enforce chapter six', *Daily Nation,* 3 June 2017, 21; M. Mwangi, 'EACC says IEBC cleared people with integrity issues to vie', *Daily Nation,* 22 September 2017, 6.

the electoral management system much trust.[57] The lack of trust in the system led the opposition and other groups to institute a number of anti-IEBC actions. These included opposition-led street protests and calls from the NCCK demanding for the resignation of the first IEBC chairperson, Issack Hassan. The opposition even set up a parallel tallying centre to rival the IEBC one, accusing the Commission of partisanship and lack of transparency.[58]

The second broad challenge consisted of interference in the operations of the IEBC by the Uhuru administration. This interference took two dimensions. First, it involved interfering in the procurement operations of the Commission, with the opposition successfully petitioning against IEBC's award of a ballot paper printing contract to a Dubai-based company called Al Ghurair Printing and Publishing Company. The opposition argued that the award of tender to the company had been influenced by the Uhuru administration.[59] Secondly, government interference in IEBC operations involved deployment of state agencies to securitise the elections. In the lead to the August 2017 election, the opposition National Super Alliance (NASA) coalition produced documents it claimed indicated evidence of government's plans to deploy the military in the elections. The documents were authenticated as genuine by military spokesman Joseph Owuoth before they were denounced as fake by Defence Cabinet Secretary (CS) Raychelle Omamo.[60]

The third set of challenges were internal to IEBC itself. The most significant of these challenges was the failure of technology even after spending US$ 52 million to set it up, forcing the Commission to revert to manual systems of voter verification and vote tallying in both the 2013 and 2017 elections. This failure became the basis of the petitions challenging the outcome of the presidential election in both the 2013 and 2017 elections. For the 2017

[57] Kanyinga and Odote, 'Judicialisation', *Journal of Eastern African Studies,* 241.
[58] G. Murunga, 'Kenya must prioritise electoral reforms to secure autonomy of IEBC', *Sunday Nation,* 6 August 2017, 11; Ondieki, 'Tough man'; F. Oluoch, 'Kenyan electoral bodies: A history of blunders and short stints', *Daily Nation,* 21 October 2017, 12; Kanyinga and Odote, 'Judicialisation', *Journal of Eastern African Studies,* 241-248; J. Wangui, 'Former IEBC chief Oswago defends himself in graft case', *Daily Nation,* 13 October 2020, 5; H. Epstein, 'Kenya: The Election and the Cover-Up', *The New York Review*, 30 August 2017, https://www.nybooks.com/online/2017/08/30/kenya-the-election-and-the-cover-up/, (accessed on 23 January 2019).
[59] G. Kegoro, 'Dialogue must be about electoral justice, nothing else', *Sunday Nation,* 29 October 2017, 29; Maina, *State Capture*, 29-32; Onyando, *Quest*, 1–76.
[60] W. Menya, 'Be truthful with Kenyans, former IEBC officials told', *Daily Nation,* 22 July 2017, 12; Epstein, 'Cover-Up'; W. Menya, 'Key to successful elections on August 8', *Daily Nation,* 5 August 2017, 9; W. Menya, 'Use of too many officers may scare off voters, warns observer', *Daily Nation,* 5 August 2017, 9.

elections, the failure of technology could partly be attributed to the assassination of Chris Msando, the IEBC's information technology manager, only 10 days to the elections.[61]

The second internal challenge involved massive corruption in the IEBC. Senior staff in the Commission were found culpable in massive procurement irregularities involving the Commission's funds. The irregularities included purchasing items at 3 times their actual market price, awarding tenders to favoured companies such as Al Ghurair and unnecessary expenses such as purchase of security equipment when government provided the same to the Commission, as well as purchase of food and accommodation for the Commission's staff.[62]

Perhaps more significant of the challenges the IEBC faced was the inability to follow the law in discharging its mandate. This manifested itself in at least two ways. First, it failed to bar candidates whose integrity had been called to question as required by Chapter Six of the Constitution. In defending its inability to bar candidates with questionable integrity, the Commission claimed that there was no adequate legal framework for doing so.[63] Secondly, the IEBC was unable to regulate the behaviour of politicians during campaigns. It slapped electoral offenders with petty fines which did not deter electoral offences. One of the main electoral offenders was the Uhuru administration, which not only deployed state resources in its campaigns but also hired Cambridge Analytica, a British election propaganda firm, which generated hate messages against the main opposition candidate Raila Odinga. Both activities broke the electoral code of conduct, but the IEBC failed to stop them.[64]

Failure to follow the electoral law led to the nullification of the 2017 presidential election by the Supreme Court of Kenya on 18 August 2017 by a majority ruling of 4 to 2. The main reason the Court gave for the nullification of the election was the IEBC's refusal to follow the

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[61] J. W. Rosen, 'How to Undermine a Democracy', *The Atlantic*, 27 December 2017, https://www.theatlantic.com/international/archive/2017/12/how-to-undermine-a-democracy/549089/, (accessed on 26 January 2019).

[62] K. Opala, 'Impunity reigned at IEBC in tenders scam whose "theft was beyond the imaginable"', *Daily Nation,* 17 December 2018, 4; M. Nyamori, 'MPs query millions spent in procuring food, accommodation for IEBC bosses', *The Standard,* 1 November 2020, 11.

[63] M. Mwangi, 'EACC says'; P. Langat, 'Why top officials' hands are tied in war against corruption', *Sunday Nation*, 25 June 2017, 11; W. Menya, 'The nine lives of Wafula Chebukati', *Sunday Nation,* 18 April 2021, 9.

[64] F. O. Owuor, 'Reflections on Electoral Management in Kenya – Violence and Intimidation: Lessons from the 2017 Presidential Elections in Kenya', in *Reflections on the 2017 elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya,* ed. James Gondi (Nairobi: The Kenyan Section of the International Commission of Jurists [ICJ Kenya], 2018), 127–145; Rosen, 'Undermine'; P. Wafula and G. Mosoku, 'Uproar over Uhuru campaign agency's election tricks', *The Standard,* 21 March 2018, 11; P. Lang'at, 'IEBC says Cabinet Secretaries are free to campaign for Uhuru', *Daily Nation,* 12 April 2017, 9; B. Namunane, 'Joseph Kinyua orders use of State cars in Uhuru campaigns', *Daily Nation,* 17 October 2017, 6; I. Mugo and V. Jebet, 'Wamalwa: We won't stop campaigning for the President', *Daily Nation,* 22 September 2017, 7; I. Oruko, 'IEBC impotent in punishing early campaigners', *Daily Nation,* 10 December 2021, 6.

directives which the Court had issued, particularly proof of results transmission. The Court ordered for a repeat poll to be held within 60 days.[65]

The repeat election deepened the Uhuru administration's control of the IEBC. In the immediate aftermath of the election nullification, parliament, dominated by the Uhuru administration's Jubilee party members, amended a number of electoral clauses to limit the role of the judiciary in arbitrating electoral disputes and to enhance the control of parliament over the IEBC. These changes were to remain active beyond the 2017 election and were subject of early protests from candidates in the 2022 election.[66]

The opposition responded to these changes with street protests demanding the disbandment of the IEBC. The Uhuru administration not only rejected calls for the disbandment of the IEBC but also clamped down on protests, leading to the death of some 92 people.[67] The opposition eventually boycotted the electoral rerun, allowing the Uhuru administration to be re-elected for a second term with a 98% majority, although this was based on a suppressed voter turnout of only 39%.[68]

Uhuru Administration and the Constitution after the 'Handshake'

The tension between the administration and the political opposition continued in the first three months of the administration's re-election for a second term. The height of the tension was reached when the opposition leader Raila Odinga organised a political rally at Nairobi's Uhuru Park and took a mock oath as the 'people's president of Kenya' on 30 January 2018.[69] Shortly afterwards, however, there was a marked reduction in the tension when President

[65] C. Torchia, 'Observers in the spotlight ahead of Kenya's election re-run', *Associated Press*, 7 September 2017, https://halifax.citynews.ca/2017/09/07/observers-in-the-spotlight-ahead-of-kenyas-election-re-run/, accessed on 24 January 2019); Epstein, 'Cover-Up'.

[66] B. Sihanya, 'Electoral Justice', *The Law Society of Kenya Journal*,.24-25; Justus Ochieng', 'You have no role in election planning, UDA tells Koome', *Daily Nation*, 24 November 2021, 6.

[67] J. Biegon and C. Mugo, 'Blood in the street: Police Violence and Human Rights Violations During the 2017 General Election in Kenya', in *Reflections on the 2017 elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya*, ed. Jame Gondi (Nairobi: The Kenyan Section of the International Commission of Jurists (ICJ Kenya), 2018, 73–101.

[68] Rosen, 'Undermine'; P. Lang'at, 'MPs seek bigger role in hiring IEBC chiefs', *Daily Nation*, 5 October 2020, 7; Epstein, 'Cover-Up'; M. Yusuf, 'Rights Commission: Kenya Police Killed More Than 30 After Election', *VOA*, 9 October 2017, https://www.voanews.com/a/rights-commission-kenya-police-killed-more-than-thirty-election/4062779.html, (accessed 23 September 2020); T. McConnell, 'A Deadly Election Season in Kenya', *The Atlantic*, 23 January 2018, https://www.theatlantic.com/international/archive/2018/01/kenya-police-murder-odinga-kenyatta/551129/, (accessed 21 October 2020); W. Maina, 'Flawed election could turn out to be Uhuru Kenyatta's poisoned chalice', *Sunday Nation*, 29 October 2017, 23–24.

[69] B. Muriuki, 'Raila sworn in as "people's president"', *Citizen Digital*, 30 January 2018, https://www.citizen.digital/news/raila-swears-self-in-as-peoples-president-189610, (accessed 21 September 2020).

Kenyatta and Raila Odinga announced an unexpected political truce through what was characterised as 'the handshake' on 18 March 2018.[70] The handshake marked a shift in the administration's incentives, ushering in the second dimension in its relationship with the rule of law institutions in the country. Whereas the administration's major incentive during its first term was focused on evading the ICC, in the second term, the major incentive became management of the Uhuru Kenyatta succession in 2022. The shift in incentives had a significant influence on the relationship the administration cultivated with the rule of law institutions, particularly the Constitution, the political opposition, parliament, the anti-corruption agencies, and the judiciary.

The Uhuru administration streamlined the handshake with opposition leader Raila Odinga into the Building Bridges Initiative (BBI). Through the BBI, the administration commenced efforts to amend the Constitution to bring in changes which it and Raila Odinga felt would create inclusive politics and end a system in which big ethnic groups dominated the country's presidency.[71] The proposed changes were, among others, expanding the executive to reduce the tensions over the presidency which come at every election cycle; taking the country's executive back to a hybrid system in which the president and the prime minister share some power away from the pure presidential system; the official elevation of the National Assembly above the Senate; reinstatement of the Office of the Leader of the Opposition; and the provision for presidential candidates to simultaneously contest for parliamentary seats. Other proposed changes were reform of the JSC to reduce the dominance of judicial officers in the Commission; introduction of timelines for the presidency to make constitutional appointments; and clarification of the roles of deputy governors as well as the procedure for running county governments in cases where governors have been suspended due to pending court cases.[72]

Despite the proposed changes, the BBI faced opposition from different quarters. Prominent among these were the deputy president William Ruto, sections of CSOs and sections of the

[70] T. Wilson, 'Handshake ends crisis and leads to signs of progress in Kenya', *The Financial Times,* 1 November 2019, https://www.ft.com/content/59339450-d555-11e9-8d46-8def889b4137, (accessed on 21 July 2021).
[71] 'The time has come to amend 2010 Constitution, Uhuru now says', *Daily Nation*, 27 August 2020, 2.
[72] W. Menya and A. Chepkoech, 'How Kenya will look and feel like under a BBI environment', *Sunday Nation,* 28 February 2021, 23; N. Kitonga, 'Correcting Constitutional mistakes of Naivasha', *Sunday Nation*, 6 October 2019, 24; I. Oruko, 'CoE proposals make comeback', *Daily Nation*, 26 October 2020, 23; K. Mutua, 'Nzamba had endorsed constitutional review as proposed in BBI', *Daily Nation*, 28 October 2020, 19; A. Olingo and I. Oruko, 'Raila steps up call for 14 regional governments', *Daily Nation*, 27 August 2020, 5; P. Mwangi, 'Separating facts from fiction on the BBI proposals', *Sunday Nation*, 25 October 2020, 26.

judiciary. For the deputy president, the main reason for rejecting BBI was the suspicion that the initiative was a scheme by President Kenyatta and Odinga to thwart his ambition to succeed President Kenyatta in 2022. Sections of CSOs, on the other hand, rejected the BBI on the basis that it was exclusionary, divisive and possibly aimed at extending President Kenyatta's hold onto power. The judiciary declared the BBI unconstitutional in a High Court ruling on 13 May 2021, sparking a new confrontation between the judiciary and the Uhuru administration.[73]

Uhuru Administration and Checks and Balances Institutions after the 'Handshake'

The Uhuru administration's influence over parliament continued as it had been during the first term. This was reinforced through the re-election of Justin Muturi as the National Assembly speaker and the election of defeated Bungoma governor Kenneth Lusaka as the Senate speaker. The speakers remained pliant to the administration and supported its legislative agenda. Parliament continued to exhibit weaknesses which had made it unable to hold the Uhuru administration to account. These included issues of integrity among a sizable number of parliamentarians, limited capacity to investigate complex cases such as the Medical Equipment Supplies (MES) scam and weaknesses in terms of vetting executive nominees. The most significant weakness was the failure by parliament to enact the two-thirds gender rule, which led Chief Justice David Maraga to write to the President advising him to dissolve the institution as demanded by the Constitution, a petition which the President ignored.[74]

The specific influence of the 2022 succession politics on parliament manifested itself when the Uhuru administration, with support from the main opposition party ODM, changed the composition of parliamentary committees. The changes resulted in the replacement of the deputy president's allies with those of the President and Raila Odinga in important parliamentary committees. The replacements enabled the Uhuru administration to force

[73] K. Makokha, 'Handling of BBI cases is proof of judicial reforms', *The Standard,* 22 August 2021, 23; 'Ensure Kenyans get the benefits of Constitution', *Daily Nation,* 26 August 2020, 21; J. Wangui, 'Blow for Uhuru, Raila as judges declare BBI push null and void', *Daily Nation,* 14 May 2021, 2.

[74] K. Kimanthi, 'Land of anarchy'; S. Kiplagat, 'MP Gachagua's shock as court freezes Sh200 million in account', *Daily Nation,* 23 October 2020, 9; W. Ayaga, 'State cooked books and lied about big debt, Moses Kuria reveals', *The Standard,* 6 November 2019, 3; J. Kisero, 'Strengthen House committees', *Daily Nation,* 7 October 2020, 22; Editorial, 'Vetting of nominees by MPs now a sham', *Daily Nation,* 3 October 2019, 21; J. Kamau, 'Gachagua in detectives' crosshairs over Sh12bn tender deals fortune', *Daily Nation,* 1 July 2021, 11; P. Wafula, 'False wins, court cases and the thin veil of charity: How betting firms took Kenyans for a ride', *Sunday Nation,* 13 December 2020, 12.

through parliament a number of bills, including those supporting the BBI constitutional amendments and a controversial revenue-sharing formula characterised by highly publicised arrests of senators who were most vocal in rejecting the formula.[75]

Anti-corruption Institutions under the Uhuru Administration after the 'Handshake'

A more subtle consolidation of the Uhuru administration's influence over the rule of law institutions was witnessed in the administration's second term relationship with institutions combating corruption, particularly the EACC, the office of the DPP and the Directorate of Criminal Investigations (DCI). This evolved in three main ways which involved imposing structural changes on the institutions by the administration, the performance of the institutions and the obstacles which the institutions faced during this period. In terms of structural changes, the first structural change which the administration enacted was setting up a new agency, the Multi-Agency Team (MAT) whose mandate was to coordinate efforts against corruption. Membership of the MAT consisted of the Attorney-General, the DCI, the EACC, the Assets Recovery Authority, the Kenya Revenue Authority and the Financial Reporting Centre.[76]

The second structural change consisted of changes in the leadership of the EACC, the DPP and the DCI, the three frontline institutions for fighting corruption. For the EACC, Twalib Mbarak was appointed as the new Chief Executive Officer to replace the acting Halakhe Wako. In the office of the DPP, Noordin Haji replaced Keriako Tobiko. For the DCI, the new head was George Kinoti.[77] Each of the new officers instituted specific changes in the institutions they headed, further deepening the structural changes in the institutions. In the EACC, Mbarak attempted to clarify the difference in mandates between the EACC and the office of the DPP, indicating that the EACC's mandate was confined to investigating corruption, while prosecution was the mandate of the office of the DPP.

[75] P. Lang'at and I. Oruko, 'Kenneth Lusaka elected Senate Speaker', *Daily Nation*, 31 August 2017, 4; 'Answer for locking media out of crucial Senate sitting', *Daily Nation*, 19 August 2020, 21; J. Ochieng, 'Raila faults government over arrest of senators', *Daily Nation*, 18 August 2020, 21.
[76] Edwin Okoth, 'Kenyans now wait for action as graft summit ends', *Sunday Nation*, 27 January 2019, 12; 'Let us all dig in and bring an end to graft', *Daily Nation*, 25 January 2019, 21.
[77] Akech, 'Abuse', 387; 'Recalibrating the clock', *The Nairobi Law Monthly*, 10, No. 7 (2018): 52-53; K. Motaroki, 'For man and country', *The Nairobi Law Monthly* 10, No. 7 (2018): 44-51; N. Gisesa, 'Business unusual as "there are no sacred cows in our war on crime"', *Sunday Nation*, 12 July 2020, 23; J. Murimi, 'DPP sets up Prosecution Fund to collect corruption money', *Daily Nation*, 13 December 2019, 12.

Further changes to the institution were sought through the Statute Law (Miscellaneous Amendments) Bill 2020. The new proposed law intended to reduce the time taken to prosecute cases of corruption by giving them a maximum timeframe of two years. It also sought to empower the EACC to monitor foreign accounts of state officials and compel public officials to sign a leadership and integrity code.[78]

On the other hand, the office of the DPP's new head, Noordin Haji, carried out a number of positive reforms. One of these reforms was setting up a Prosecution Fund into which proceeds of corruption would be surrendered to the government. Others included procuring the services of an international lawyer to support in prosecuting high-profile cases, instituting plea bargaining as an alternative form of justice, drafting guidelines meant to enhance the prosecution of suspects, working on curbing police impunity and extrajudicial killings as well as extending the services of the office of the DPP beyond Nairobi and major cities.[79]

The changes resulted in some moderate improvement in the performance of the institutions. Under Twalib for instance, the EACC reported arrests of senior government officials, recovery of grabbed public land, and asset recovery in cases involving government officials. For the office of the DPP, one early notable success under the leadership of Haji was convincing the judiciary to compel public officials accused of corruption to resign from their offices till the conclusion of their cases. It also managed to secure at least one high-profile conviction involving an MP and a mother to an ambassador in a case in which the public had lost Ksh.313 million. Besides the EACC and office of the DPP, the Assets Recovery Authority also recovered at least Kshs. 3bn between 2018 and 2019 from proceeds of corruption.[80]

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[78] J. Kamau, 'Proposed law wants graft cases concluded in 2 years', *Daily Nation,* 24 June 2020, 23.

[79] Murimi, 'Prosecution Fund'; 'In the long term, have all-Kenyan prosecution', *Daily Nation,* 7 December 2018, 21; S. Kiplagat and J. Kahongeh, 'Plea bargain and why it is in vogue', *Daily Nation,* 18 November 2019, 15; D. Mwere, 'Haji unveils new guidelines to boost prosecution of suspects', *Sunday Nation,* 26 July 2020, 12; M. Ahmed, 'Noordin Haji warns police against wanton killing of suspects', *Sunday Nation,* 9 September 2018, 9; N. Musau, 'You haven't seen anything yet: DPP Haji vows to shake more trees', *Sunday Standard,* 2 December 2018, 12; W. Wairimu, 'DPP Noordin Haji says offices to be opened in remote areas', *Sunday Nation,* 15 December 2019, 13; 'Haji: I will rededicate and reinvigorate the effort against corruption', *Sunday Nation,* 20 May 2018, 11.

[80] Gisesa, 'Business unusual'; A. Ochieng, 'Kenya will be hostile for graft lords, says EACC boss Twalib Mbarak', *Daily Nation,* 14 January 2019, 9; I. Oruko, 'At vetting, Mbarak promises independent, graft-free EACC', *Daily Nation,* 14 December 2018, 4; B. Wasuna, 'EACC officers arrest Kebs boss Bernard Njiraini amid bribery probe', *Daily Nation,* 2 July 2020, 3; J.Wangui and B. Wasuna, 'EACC recovers Sh5bn Met Dept land grabbed 23 years ago', *Daily Nation,* 3 August 2020, 13; S. Kiplagat, 'How State roads engineer amassed Sh1.5bn in bribes', *Daily Nation,* 2 October 2020, 14; P. Lang'at, 'Nasa MPs back Haji, want Mwilu and Obado to step aside', *Daily Nation,* 7 December 2018, 12; N. Gisesa, 'Big names in graft cases stare at bleak future

Despite the structural changes and the relative improvement in performance, the anti-corruption institutions faced at least three obstacles, which limited further improvement in performance. These obstacles came from the institutions' internal weaknesses, the approaches they employed in fighting corruption and criticism from the political class which linked their work to the Uhuru administration's 2022 succession plans.[81] In terms of internal weaknesses, the main issue involved turf wars between the different agencies which derailed the anti-corruption work. A case in point was the turf war between the DCI and the DPP over the prosecution of two officials, one each from the Kenya Ports Authority (KPA) and the Kenya Revenue Authority (KRA) who had been indicted for involvement in corruption. Whereas the DCI charged the two officials in court, the DPP did not support the process, leading to the collapse of the cases.[82] The institutions also faced competition from parliament, which instituted parallel investigations on corruption, leading to the speaker Justine Muturi to ban parliament from initiating investigations on cases which other anti-corruption agencies were investigating.[83]

Besides the turf wars, the second source of problems for the anti-corruption institutions emanated from approaches they deployed in fighting the vice. For instance, DPP Haji was accused of making arrests prior to completion of investigations, detaining suspects without trial and coercing law courts against giving bail and conservatory orders to suspects.[84]

Perhaps the biggest obstacle to the anti-corruption institutions came from the political class, which linked the institutions' work to the 2022 succession politics. Politicians claimed that the institutions had been turned into partisan instruments through which the Uhuru administration sought to manage its 2022 succession plans. They further claimed that the institutions were targeting only one ethnic group in their fight against corruption. In order to

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after Waluke shocker', *Sunday Nation,* 28 June 2020, 11; S. Kiplagat, 'Two South Africa witnesses could have nailed Waluke and Wakhungu', *Daily Nation,* 27 June 2020, 12; C. Omulo, 'Kenya has recovered Sh3bn graft money in 2 years: AG Kihara', *Daily Nation,* 4 February 2019, 4.

[81] 'Make graft painful by securing convictions', *Sunday Nation,* 6 September 2020, 23; N. Gisesa, 'Despite reforms, Haji yet to score major victory', *Sunday Nation,* 10 March 2019, 24; 'Collapse of Mwilu case an indictment of graft probe', *Daily Nation,* 1 June 2019, 23; 'Graft war needs jail power', *Sunday Nation,* 19 January 2020, 21.

[82] W. Menya, 'Delay in Sh2bn KPA scandal case sparks fears of obstruction', *Daily Nation,* 1 December 2019, 2; 'Feud will hurt war on crime', *Daily Nation,* 29 April 2020, 23; W. Menya, 'Attempts by DPP, DCI to create perception of unity flops badly', *Sunday Nation,* 8 March 2020, 26; 'DPP, detectives tiff may derail graft war', *Daily Nation,* 4 March 2020, 23; V. Achuka, 'Noordin Haji conflicts with investigative agencies', *Sunday Nation,* 10 October 2021, 3; B. Wasuna, 'Graft case that drove a wedge between DCI Kinoti and DPP Haji', *Daily Nation,* 22 June 2020, 24.

[83] J. Kamau, 'Criminal cases without DPP's nod are unlawful, court says', *Daily Nation,* 17 July 2020, 6; 'Ruling should settle DPP and DCI rivalry', *Daily Nation,* 18 July 2020, 23; Warigi, 'Help!'

[84] N. Havi, 'An Overzealous DPP is a peril to the Rule of Law', *The Platform,* 4 January 2019, 3.

reduce the independence of the institutions, one MP attempted to move a motion in parliament which sought to revert the office of the DPP back to the control of the AG.[85]

The Political Opposition under the Uhuru Administration after the 'Handshake'

The political opposition was perhaps the checks and balances institution which totally succumbed to the Uhuru administration's influence during its second term. The relationship between the administration and the political opposition in the administration's first term had been marked by hostility and open conflict. The hostility was so much that in the lead up to the 2017 election, the administration employed repressive tactics against the political opposition, the media and civil society groups in ways that resembled the early multi-party era.[86]

But in March 2018, the Uhuru administration entered into a partnership with ODM, the main opposition party through the 'handshake'. The partnership was ostensibly meant to calm the country from ethnic polarisation arising from the 2017 elections. The 'handshake' gave birth to the BBI, which sought to introduce amendments to the 2010 Constitution to entrench a broad-based executive. Through the partnership, the opposition became less critical of the administration, prompting fears that it had been co-opted.[87]

Judiciary under the Uhuru Administration after the 'Handshake'

The judiciary was by far the institution whose relationship with the Uhuru administration deteriorated the most among the five checks and balances institutions which witnessed shifts in their relationship with the administration in its second term. The deterioration had begun earlier but worsened following the nullification of the presidential election results from the

[85] W. Wanyoike, 'Blaming Judiciary for the failure in war on corruption is too simplistic', *Sunday Nation*, 27 January 2019, 26; P. Lang'at, 'War on corruption muddies William Ruto's 2022 election bid', *Sunday Nation*, 9 December 2018, 24; 'Vitriol against State officials uncalled-for', *Daily Nation*, 7 March 2020, 23; W. Menya and I. Oruko, 'Political storm over Ruto ally's proposal that seeks to scuttle war on corruption', *Sunday Nation*, 31 March 2019, 8.

[86] M. Gaitho, 'Election stand-off smacks of a case of history repeating itself', *Daily Nation*, 23 October 2017, 19; S. Apollo, 'Githu Muigai: CJ Maraga erred by annulling Uhuru's win', *Daily Nation*, 25 August 2020, 26; O. Obonyo, 'Uhuru ruthlessness in silencing critics a replica of Jomo's style', *Sunday Nation*, 18 February 2018, 21; Githae, 'Crackdown'.

[87] D. Kweyu, 'Bishop: Handshake has weakened Opposition', *Daily Nation*, 3 February 2020, 7; 'Lack of opposition a danger to the country', *Daily Nation*, 8 August 2020, 23; J. Ochieng', 'Leaders, experts ponder fate of opposition party', *Daily Nation*, 24 April 2019, 5; W. Menya and S. Apollo, 'Civil society becomes new opposition after Handshake', *Sunday Nation*, 13 June 2021, 7–8.

August 2017 election.[88] In the immediate aftermath of the nullification, the executive and parliament embarked on an outright onslaught of the judiciary, trying to push it into a subservient relationship to the two institutions. The administration instituted at least six sets of hostile measures against the judiciary.[89]

The first set of measures came on 30 September 2017. It consisted of personal and visceral insults against judges by the President and other senior government officials. The President referred to the Supreme Court judges as *wakora* (thugs), accused them of being compromised, and stated that the judiciary had a problem which he vowed to 'revisit' and 'fix'.[90] The Senate majority leader Kipchumba Murkomen threatened the Supreme Court with disbandment. Other government functionaries such as CS Raphael Tuju wrote letters demanding explanation for the nullification of the presidential election. These actions were followed by intense online smear campaigns and court proceedings against the judges.[91]

The second set of measures against the judiciary were administrative. Using its influence over other state agencies and functions, the Uhuru administration withdrew security for Supreme Court judges and deployed executive orders against a number of judicial officers. It also cut down the annual judicial budget, reducing it from a total Kshs. 31.2 billion to Kshs. 14.5 billion for the Financial Year 2019/20. This had adverse effects on judicial operations, forcing a scaling down of activities. Further, the executive downgraded the office of the Chief Justice in the pecking order of official government protocol, refusing to recognise the Chief Justice at public functions.[92]

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[88] Khobe, 'Judicial', 5–22; N. Cheeseman et al, 'Kenya's 2017 elections: winner-takes-all politics as usual?' *Journal of Eastern African Studies* 13, No. 2 (2019): 215–234; S. Otieno, 'Maraga to Uhuru: You let us down', *Saturday Nation,* 28 November 2020, 4; V. Achuka, 'Judiciary lays bare president's power limits', *Saturday Nation,* 29 May 2021, 9–10; J. Wangui, 'Impeach Uhuru for violating the law, Maraga tells House', *Daily Nation,* 10 June 2021, 3; I. Oruko, 'Ex-CJ Willy Mutunga tells off Uhuru for leaving out six judges', *Daily Nation,* 8 June 2021, 3.

[89] 'Haji: I will rededicate and reinvigorate the effort against corruption', *Sunday Nation,* 20 May 2018, 6; 'Fighting Judiciary and CJ bad for democracy', *Daily Nation,* 1 July 2020, 23; 'Maraga and Uhuru must work together', *Daily Nation,* 10 June 2020, 23; 'Support Judiciary so as to dispense justice', *Daily Nation,* 3 January 2020, 23.

[90] 'Stop the insults, Judiciary tells President Kenyatta', *Sunday Nation,* 3 September 2017, 3; 'Insults, threats to judges an affront to democracy', *Sunday Nation,* 3 September 2017, 23.

[91] G. Kegoro, 'Maraga must shun appeasement, defend independence of Judiciary', *The Standard,* 29 July 2018, 16; C. Waitara, 'The Judicialisation of Politics in Kenya', in *Reflections on the 2017 Elections in Kenya,* ed. James Gondi (Nairobi: The Kenyan Section of International Commission of Jurists, 2018), 38–49; Munabi, 'Judicialisation', 51-71; H. Kimuyu, 'Banners on city roads call out Judiciary on delivery of justice', *Daily Nation,* 28 January 2020, 4; J. Wangui, 'David the CJ has always taken on Goliaths using the law', *Sunday Nation,* 27 September 2020, 26.

[92] 'Why is Judiciary being fiscally strangled?' *The Nairobi Law Monthly,* 10, No. 6 (2018): 12; 'Four Hundred Judgements to write, no pens or paper', *The Nairobi Law Monthly,* 11, No. 8 (2019): 31–33; 'Increase funding

The third set of measures involved blaming the judiciary for the administration's failure to tackle corruption. This accusation was particularly highlighted during the two summits which the administration organised for checks and balances institutions in October 2016 and in January 2019. In both summits, the judiciary was accused of taking too long to determine cases of corruption and favouring rich suspects. In addition, it gave easy bail terms to high profile corruption suspects, thus encouraging the vice rather than discourage it.[93]

The fourth set of measures instituted by the administration targeted individual judges for intimidation. High on the list of targeted judges was the Chief Justice David Maraga himself. In the aftermath of the nullification of the presidential election, Maraga faced numerous petitions and hostile actions by amorphous groups to push him out of office. One such group called itself the People's Law Society of Kenya. A prominent personality among the petitioners was Nyeri Town MP Ngunjiri Wambugu.[94] Besides Maraga, the deputy Chief Justice Philomena Mwilu faced similar intimidation. In the immediate aftermath of the September 2017 presidential election nullification, her personal driver was shot at by unknown gunmen. Shortly afterwards, the DPP Noordin Haji attempted to arrest the judge for alleged corruption. This was against the laid down procedure for dealing with impropriety involving judges.[95] Other judges who faced hostile actions from the administration were

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for Judiciary to function', *Sunday Nation,* 28 April 2019, 23; G. Odiwuor and B. Ocharo, 'Amadi: Judiciary budget cuts will hurt taxpayers', *Daily Nation,* 11 July 2020, 7; A. Kitimo, 'Crisis looms in Judiciary as budget cut by 50pc', *Daily Nation,* 18 October 2019, 11; A. Ochieng, 'DP Ruto promises to address Judiciary budget cut', *Daily Nation,* 26 July 2018, 3; P. Lang'at, 'Maraga: Judiciary is at the mercy of people who won't even take my calls', *Daily Nation,* 30 July 2018, 8; 'Jubilee onslaught on the Judiciary set to intensify', *Sunday Nation,* 18 February 2018, 16.

[93] O. K'Onyango, 'Uhuru tirade against courts sparks outrage', *Daily Nation,* 3 June 2021, 4; P. Mwangi, 'Time quickly running out for Judiciary to protect rule of law', *Sunday Nation,* 10 March 2019, 26; D. Mwere, 'Uhuru challenges Judiciary to deliver in graft war', *Daily Nation,* 16 January 2020, 5; Nyamori, 'Roasts'; 'Judiciary must do more to fight graft', *Sunday Nation,* 27 January 2019, 23; T. Ngugi, 'Wheels of justice begin to creak then come to a standstill when bigwigs are in the dock', *The East African,* 26 February 2020, 21; D. Mwere, 'Lobby presses for convictions to fuel anti-graft war', *Daily Nation,* 23 January 2020, 7; P. Mwangi, 'How Judiciary Is Standing in Way of Justice', *Daily Nation,* 6 January 2019, 26; P. Lang'at, 'Nasa'; C. Omulo, 'Maraga fires back, says Haji's office slowing down graft cases', *Sunday Nation,* 16 December 2018, 3; A. Ochieng' and D. Mwere, 'Maraga tells critics to stop accusing Judiciary of laxity', *Daily Nation,* 15 January 2019, 4; Wanyoike, 'Simplistic'; A. Ochieng, 'Why courts take too long to conclude high-profile graft cases', *Daily Nation,* 21 October 2019, 18.

[94] H. Kimuyu, 'Judiciary urges DCI to investigate anti-Maraga banners', *Nairobi News,* 12 June 2020, 4; E. Cropley 'Exclusive: Kenyan Supreme Court judges denied extra security after shooting – source', *Reuters,* 25 October 2017, https://www.reuters.com/article/idUSKBN1D02KW/, (accessed on 22 July 2020); Lang'at. 'Maraga'; Ochieng. 'DP Ruto promises'; N. Gisesa, 'I'm not going anywhere, CJ tells Kenyans', *Daily Nation,* 2 July 2020, 6; J. Wangui, 'Wambugu Ngunjiri takes on Judiciary with sweeping changes to law', *Sunday Nation,* 1 August 2021, 8.

[95] 'Judicial officers must have day in court too', *Daily Nation,* 13 September 2019, 23; N. Musau, 'DCJ Mwilu: I have never been this scared, but I'm going nowhere', *The Standard,* 7 July 2019, 8; J. Wangui and R. Munguti, 'Judge Anthony Mrima: I have received threats', *Daily Nation,* 19 November 2021, 6; S. Otieno, 'ICJ Kenya claims intelligence officers intimidating judges', *Daily Nation,* 26 October 2021, 9; W. Menya, 'Revisiting'; S.

Enock Chacha Mwita and George Odunga. While Justice Mwita was transferred from Nairobi to the High Court in Kajiado in February 2019, the administration demanded that Justice Odunga recuses himself from certain cases involving the electoral process in the lead up to the 2017 election.[96]

The fifth set of measures involved administration functionaries refusing to follow orders issued by the courts. Perhaps the most outstanding of the rejected court orders was the refusal by the President himself to appoint 41 new judges whose names had been sent to him by the JSC. The move not only led to grounding of judicial activities, but also led to confrontation between the President on the one hand and the Chief Justice and the JSC on the other.[97] Other rebuffed court orders included the refusal to produce political activist Miguna Miguna in court, continuing to hold politician Moses Kuria in cells even after courts ordered his release, refusal to pay compensation to victims of state torture, failure to pay for land taken from the Kenya Defence Forces, recruitment of Cuban doctors, shutting down of TV stations, refusal to issue the Ogiek with land titles and evicting the Sengwer from their land. To justify its defiance against court orders, the administration claimed that the orders were too many. It then set up its own rule that it would only follow court orders verified by the AG.[98]

The final set of measures against the judiciary from the Uhuru administration involved making deliberate attempts to take over the JSC. The attempted takeover happened in two main ways. First, the administration attempted to impose on the JSC people thought to be friendly to government. Secondly, the administration attempted to turn the JSC into a

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Kiplagat and R. Munguti, 'Blow for Haji in Mwilu case as court suspends hearings', *Daily Nation*, 1 September 2020, 6; 'Collapse of Mwilu case an indictment of graft probe', *Daily Nation*, 1 June 2019, 23.

[96] M. Njagih, '"Evil clique of judges" out to humiliate us, says Matiang'i', *The Standard*, 4 April 2018, 11; J. Wangui and B. Wasuna, 'Maraga moves 42 judges in major Judiciary shake-up', *Daily Nation*, 26 September 2020, 4.

97 J. Wangui, 'AG on the spot over Kenyatta's violation of constitutional provisions', *Daily Nation*, 22 April 2021, 26; S. Kiplagat 'Uhuru rejects six judges from JSC list, confirms 34 new ones', *Daily Nation*, 4 June 2021, 9; G. K. Kuria, 'Breaking The Law: Justice In The Wake Of Disobedience Of Judicial Orders', (presentation, LSK Conference, Nairobi, 14 August 2014); Republic of Kenya, *Report of the Kenya National Commission on Human Rights on the Violations of Human Rights in the Matter of Miguna Miguna, 2018*, Nairobi: The Kenya National Commission on Human Rights, 2018; M. Kakah, 'JSC now faults Uhuru on new judges saga', *Daily Nation*, 5 November 2019, 3; J. Wangui, 'President Kenyatta's war with judges cripples courts', *Daily Nation*, 1 November 2019, 9.

98 J. Kahongeh, 'Miguna, Moses Kuria cases add to long list of defied court orders', *Daily Nation*, 13 January 2020, 16; P. Lang'at, 'Millionaire paupers: Fired soldiers yet to receive court awards', *Daily Nation*, 31 July 2020, 14; 'State officers should obey all court orders', *Sunday Nation*, 12 January 2020, 23; S. Kiplagat, 'Defiant Uhuru Kenyatta reopens KMC plant despite court ruling', *Daily Nation*, 25 May 2021, 12; W. Khobe, 'Kenya's Totalitarian Drift and Justice Eric Ogola's Total Democracy', *The Platform*, 11 October 2018, 28; M. Wambui and R. Mbula, 'Matiang'i says AG must verify court orders before police act on them', *Daily Nation*, 30 July 2020, 18.

department of the executive.[99] Whereas the second attempt failed when the judiciary ruled the move unconstitutional, the first attempt of getting into the JSC Commissioners who were friendly to the administration succeeded. Using these friendly Commissioners, the administration attempted to have the Chief Justice replaced before the end of his tenure.[100]

The judiciary itself suffered from at least three weaknesses which exposed it to attacks by the Uhuru administration. The main weakness which the Uhuru administration exploited in fighting the judiciary stemmed from existence of corruption within the judiciary. Corruption in the judiciary was not only acknowledged by both Chief Justices Mutunga and Maraga, but it also manifested itself in a number of cases.[101] One such case involved the first Chief Registrar under the reconstituted judiciary in light of the 2010 Constitution. The Registrar was relieved of her duties on charges of having squandered Kshs. 2 billion from the Judiciary Fund. There was also a case of a senior judicial official accused of collusion with a suspect to defeat justice in a murder case.[102]

The fight against corruption in the judiciary was made difficult by the fact that the JSC was unable to discipline errant judicial officers. This was mainly because the Commission's efforts were countermanded by the Employment and Labour Relations court. It was also because the JSC itself was dominated by representatives of the judiciary who acted as protectors of their fellow judicial officers facing disciplinary cases.[103] The domination of the JSC by judicial officers gave the Uhuru administration grounds for capturing the Commission when the administration proposed to introduce a judicial ombudsman appointed by the

[99] S. Muyesu, 'Battle for the Soul of the Judicial Service Commission', *The Nairobi Law Monthly* 11, No. 2 (2019): 30–31.

[100] K. Makokha, 'An Executive march on Kenya's Judiciary', *The East African*, 17-23 February 2018, 22; D. Kiprono. 'Independence of Commissions must be protected jealously', *Sunday Nation*, 8 July 2018, 12; W. Menya, 'Fight to control JSC linked to Maraga succession intrigues', *Sunday Nation*, 9 December 2018, 11; W. Menya, 'Maraga, Mwilu accused of derailing hiring of new CJ', *Daily Nation*, 17 October 2020, 13; D. Mwere, 'Uhuru confirms Martha Koome as Kenya's first female Chief Justice', *Daily Nation*, 19 May 2021, 20; J. Wangui, 'Plan to recruit Maraga's successor hits brick wall', *Daily Nation*, 28 October 2020, 7; J. Wangui, 'CJ Martha Koome promises a better Judiciary as she takes charge', *Daily Nation*, 25 May 2021, 2.

[101] Okiri, Ngugi and Wandayi, 'Integrity', p. 147-151; S. Otieno and R. Munguti, 'Shock, anger in Judiciary after arrest of two judges', *Daily Nation*, 23 July 2021, 4.

[102] E. Ondieki, 'Why nobody lives in Sh 310m Runda house meant for CJ', *Sunday Nation*, 29 October 2017, 12.

[103] A. Nyanjong and D. J. Ochiel, 'Rethinking Judicial Independence and Accountability under a Transformative Constitution: Kenya Post-2010', in *Judicial Accountability in the New Constitutional Order*, ed. Jill Cottrell Ghai (Nairobi: The International Commission of Jurists Kenyan Chapter, 2016), 18–21; P. Mwangi, 'JSC is the real culprit in decline of the Judiciary', *Sunday Nation*, 3 February 2019, 23; J. Wangui, 'Chitembwe's JSC cases spotlight lack of rules on removing judges', *Daily Nation*, 13 December 2021, 19; W. Menya and I. Oruko, 'Puzzle of Chitembwe accusers' U-turn bid to withdraw JSC case', *Sunday Nation*, 23 January 2022, 9; S. Owino, 'When a judge stands on the other side of court', *Sunday Nation*, 23 February 2020, 23; 'Courts the weakest link in anti-graft war', *Daily Nation*, 7 September 2019, 23.

executive through the BBI constitutional amendments.[104] Nevertheless, some disciplinary action was taken against some cases of unprofessional conduct. In the 2018/2019 fiscal year, for instance, 11 judicial officers were interdicted, 94 suspended and 25 issued with "show-cause" letters after 130 new disciplinary matters were registered with the Judiciary. This built into a trend which had begun a year earlier and continued in the subsequent years.[105]

Besides corruption in the judiciary, the second weakness arose out of existing factions within the institution, with pro-government and anti-government camps emerging. Whereas the supposed anti-government faction faced hostility from the Uhuru administration, the pro-government faction made rulings which favoured the administration. Indications of the existence of the pro-government faction emerged prior to the 2017 elections, when a bench of four judges sitting outside official hours, worked to countermand earlier court orders which had been issued against the government.[106] Furthermore, certain judges were shielded by the executive when faced with disciplinary action for breaches of the judicial code of conduct, indicating conviviality in the relationship between the executive and sections of the judiciary.[107]

The third weakness involved hints of intolerance in the judiciary, especially under Chief Justice David Maraga. A case in point was the scolding of former LSK chairman Ahmednassir Abdullahi in a disagreement over a ruling which the Supreme Court of Kenya gave in a case involving two Iranian terror convicts who Abdullahi was representing. The judges took exception to the statements the lawyer made in response to their ruling. They warned that the Court would take on powers similar to those of the High Court to punish those deemed to be in contempt of the court. This threatened to cost the judiciary some of the popular support it enjoyed, especially from civil society groups.[108]

In spite of the hostile measures from the Uhuru administration and the inherent weaknesses within it, the judiciary vigorously fought against being subordinated to the executive. It did

[104] Nyanjong and Ochiel, 'Rethinking', 18-21; P. Mwangi, 'JSC is the real culprit in decline of the Judiciary', *Sunday Nation,* 3 February 2019, 24.
[105] D. Otieno, 'Unprofessional court staff sabotaging judicial reforms', *Daily Nation,* 27 February 2020, 23; A. Ochieng, 'Irony of JSC's inability to send home some of its senior staff home', *Daily Nation,* 11 September 2019, 21.
[106] M. Odhiambo, 'Justice Koome lifts lid on events in 2017 IEBC night ruling', *The Star,* 21 May 2021, 9.
[107] S. Kiplagat, 'Quorum hitch, poll officers ruling put Judiciary on spot', *Sunday Nation,* 29 October 2017, 12; Abdullahi, 'J.B. Ojwang', 32–35; 'Ojwang Tribunal is nonsense on stilts', *The Nairobi Law Monthly,* 11, No. 2 (2019), 29; W. Menya, 'Misconduct claims hover above AG nominee Kihara', *Daily Nation,* 17 February 2018, 12.
[108] S. Muhindi, 'Supreme Court scolds Ahmednassir for "disparaging remarks"', *The Star,* 16 March 2019, 9.

this in two main ways, each corresponding to either of the two challenges. To the hostile measures from the administration, the judiciary responded directly through the Chief Justice, judicial officers, lawyers and other allies of the institution.

Chief Justice Maraga himself led in the responses. In at least two instances, the Chief Justice engaged in a publicised defence of the judiciary in which he launched a scathing attack against the executive, accusing it of wanting to emasculate the judiciary.[109] Besides the Chief Justice, judiciary officials in their trade unions denounced hostile anti-judiciary executive measures. These trade unions included the Kenya Judges and Magistrates Association and the Kenya Union of Judiciary Workers. In addition, at least two groupings of lawyers emerged to defend the judiciary. These were the LSK and the Committee of Senior Counsels led by former LSK chairman Isaac Okero. Beyond the legal profession, other defenders of the judiciary against executive manoeuvres included the media through newspaper editorials and civil society groups.[110]

The second type of reaction involved internal changes and adjustments within the judiciary in response to criticism from the Uhuru administration. One such adjustment involved changes within the anti-corruption division of the High Court which aimed at reducing the time taken in presiding over cases of corruption. It also included deployment of additional magistrates to the division and improvement in capacity among judicial officials presiding over corruption cases on active case management.

In addition, sections of the judiciary made some daring and progressive rulings on corruption which helped in fighting the vice. Two such rulings came from High Court judge Justice Mumbi Ngugi who, in July 2020, ruled that corruptly acquired assets must return to state possession and public officials accused of corruption must be barred from accessing their

[109] S. Kiplagat and H. Misiko, 'Chief Justice Maraga alleges Executive plot to oust him', *Daily Nation,* 4 November 2019, 2; 'Wrong for Executive to frustrate Judiciary', *Daily Nation,* 5 November 2019, 23; S.R. Omar, 'CJ Maraga: Juniors are allowed into State House while I'm told to wait', *The Standard,* 4 November 2019, 3; C. Ang'asa, 'Judiciary out of limbo as Treasury restores funds', *Daily Nation,* 7 November 2019, 9; M. Wangari, 'Treasury CS Yattani downplays CJ Maraga's fight over budget cuts', *Daily Nation,* 6 November 2019, 13; B. Wasuna and S. Oketch, 'AG lashes out at Maraga for attack on Uhuru', *Daily Nation,* 9 June 2020, 12; S. Owino, 'Maraga refused to be bullied by the presidency and Parliament', *Daily Nation,* 25 February 2021, 26.

[110] M. Kakah, 'Judges deny derailing war on corruption', *Daily Nation,* 25 January 2019, 5; 'Stop the insults, Judiciary tells President Kenyatta', *Sunday Nation,* 3 September 2017, 4; I. Oruko, 'Senior counsels caution Uhuru over threats to Judiciary', *Daily Nation,* 14 July 2017, 8; 'Why bashing of courts must stop', *Daily Nation,* 10 July 2017, 23; B. Wasuna, 'Uhuru, David Maraga meeting expected to enhance working relations', *Daily Nation,* 6 September 2018, 5.

offices until they clear their names.[111] The second ruling involved rejection of the BBI as unconstitutional, despite pressure from the executive. The third ruling involved the jailing of DCI boss George Kinoti for 6 months in late 2021 for disobeying court orders.[112]

Impunity under the Uhuru Administration

The overall relationship between the Uhuru administration and the rule of law institutions was characterised by hostility and attempted executive takeover. As a result, the country witnessed at least two major types of impunity. These were official corruption and extrajudicial killings.[113] The official corruption witnessed under the Uhuru administration had some analysts declare the administration the most corrupt government Kenya has had since independence in 1963. The country's ratings by Transparency International remained low, earning a 27 out 100 score in 2018 and being position 137 out of 180 countries.[114]

The administration inherited a number of cases of corruption from the Kibaki era. These varied from the Triton and the Kenya Pipeline Corporation scandals in the energy sector, through the KEMRI and the cemetery scandals in the health sector, to the World Bank Education Fund scandal and the NSSF scandal. A more complicated case of corruption inherited from the Kibaki administration involved the Anglo Leasing scandal, which had begun in 2004.[115] The Uhuru administration handled the scandal in a manner which indicated its own complicity in corruption. In early 2014, the administration announced that Kenya had lost a lawsuit in Geneva involving companies linked to the scandal. As a result, it claimed that the country had been asked to pay a fine of Kshs. 1.4 billion. This was in contrast, however, to findings by both the High Court in Kenya and the private audit firm Price Waterhouse Coopers. While the High Court through Justice Anyara Emukule had ruled that entities involved in Anglo Leasing were legally non-existent and thus could not engage in a lawsuit against government, the Price Waterhouse Coopers audit had found illegal activities involving the entities. However, these findings were ignored, and the entities went ahead and

[111] M. Kakah, 'Judiciary's strategies to end corruption take shape', *Daily Nation*, 1 February 2019, 7; 'Ruling on corruption proceeds is refreshing', *Daily Nation*, 25 July 2020, 23; J. Wangui, 'EACC gets order freezing Treasury boss bank accounts', *Daily Nation*, 24 July 2020, 6.
[112] J. Wangui, 'George Kinoti jail term leaves DCI in a quandary', *Daily Nation*, 25 November 2021, 8.
[113] J. Okoth, 'The Leadership and Integrity Chapter of the 2010 Constitution of Kenya: The Elusive Threshold', in *Human Rights and Democratic Governance in post-2007 Kenya: A post-2007 Appraisal*, 275–296.
[114] D. Ndii, 'A review of anomalies that doomed the year 2016', *Daily Nation*, 31 December 2016, 26; V. Achuka, 'Sh1 trillion - Shocking numbers in the plunder of a nation', *Sunday Standard*, 9 December 2018, 10-11; V. Obara, 'Kenya fails to impress in new global corruption ranking', *Daily Nation*, 23 January 2020, 21; J. Githongo, 'Corruption: A brief history – 1997 to 2018', *The East African Review*, 12 May 2018, 8–9.
[115] N. Gisesa, 'Mischief in big fish corruption trials', *Sunday Nation*, 17 November 2019, 8.

sued the government, leading to the imposition of the fine. Against public outcry, the Uhuru administration paid the fine, justifying the payment by claiming that it was the only way to clear the country's name, stop the fine from accruing further interest and allow the country to successfully engage in another international borrowing scheme called Eurobond.[116]

The Anglo Leasing case ignited the administration's involvement in corruption. Having paid the fine arising from the case, the administration successfully borrowed a loan worth USD 2.75 billion through the Eurobond scheme. The administration explained that the money would be used to reduce government borrowing from local banks, thus easing pressure on the banks and allowing them to lend money to local businesses. However, accounting for the borrowed loan became entangled in controversy. A breakdown done by government critics indicated that the Uhuru administration had not accounted for up to US$ 1.002 billion of the borrowed money.[117] In explaining the unaccounted-for amount, the administration provided inconsistent accounts, which prompted the Auditor General Edward Ouko to conduct a forensic audit of the money. The audit was, however, stopped when President Uhuru Kenyatta dismissed it and condemned the Auditor General for doubting the government's explanation on how the money had been spent. The dismissal ended attempts to follow the Eurobond money trail.[118]

Many other corruption scandals followed in the heels of the Eurobond scandal. These ranged from the Medical Equipment Supplies scheme of late 2013,[119] the two National Youth Service (NYS) scandals, in which a total Kshs. 1.8bn was lost to well-connected individuals,[120] the Standard Gauge Railway, which was exorbitantly priced compared to similar projects across the East Africa region[121] and the Kenya Pipeline Corporation scandals in which about Kshs. 647 million was lost.[122] Other cases of corruption were the National Cereals and Produce Board (NCPB) scandal; the dams scandal in which government

[116] Maina, *State Capture*, 24–26.
[117] Maina, *State Capture*, 24–26; P. Wafula, 'Eurobond – Kenya's loan that gave Edward Ouko grey hair', *Daily Nation*, 18 February 2021, 22.
[118] Maina, *State Capture*, 24–26; P. Wafula and J. Ombuor, 'Auditor silenced: What did Ouko find on the Eurobond investigations that shut him up?' *Sunday Standard*, 9 December 2018, 8.
[119] Oketch and Owino, 'MES'.
[120] '"Nation" got it right in its coverage of the multi-billion shilling KPC and NYS scams', *Daily Nation*, 23 July 2018, 11–12; Nyamori, 'Roasts'; V. Oluoch, 'Shady, secret deals raise questions of accountability in military spending', *Daily Nation*, 22 March 2020, 23.
[121] 'Pursue, punish SGR project fraudsters', *Daily Nation*, 25 February 2020, 23; V. Achuka and P. Wafula, 'SGR's Sh1bn grass: Inside unbridled greed and negligence in megaproject', *Daily Nation*, 25 February 2020, 26.
[122] R. Munguti 'Sh791m NYS graft case stalls', *Daily Nation*, 3 September 2021, 9; B. Wasuna, 'How ex-KPC bosses evaded prosecution for five years', *Daily Nation*, 15 July 2020, 11.

allocated Kshs. 120 billion for the construction of 8 mega dams, but which were not constructed[123]; the National Hospital Insurance Fund (NHIF) scandal in which the country lost Kshs.49.5 million[124]; the Ruaraka and Karen land scandals[125]; and the corruption during response to the COVID 19 pandemic, in which Kenyans lost money meant to facilitate the management of the pandemic.[126]

Besides corruption perpetrated by government functionaries, other cases of corruption under the Uhuru administration took place in some of the institutions established under the new Constitution. Perhaps the institution which was most embroiled in corruption cases was the National Land Commission (NLC) under Muhammed Swazuri. The NLC received a total Kshs. 23.11 billion between 2014 and 2017 from other public agencies to pay compensation for land which the agencies acquired to put up public infrastructure. Instead of utilising the monies for this purpose, however, the NLC misappropriated most of the funds through numerous irregularities.[127] Other institutions involved in corruption included the Office of the Auditor-General[128] and the National Assembly, where at least two MPs were accused of misappropriating the CDF money entrusted to them.[129]

The second type of impunity under the Uhuru administration involved mysterious deaths and extra-judicial killings by suspected state agents. The first such case was the death of Makueni senator, former Cabinet minister and LSK chairman Mutula Kilonzo on 27 April 2013. Mutula had been Minister for Justice when the cases of crimes against humanity involving

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[123] J. Khamisi, *The Bribery Syndrome* (Kentucky: Jodey Book Publishers, 2020), 68–72; K. Ngotho, 'Schemes'; 'Take care Arror does not go Kimwarer way', *Daily Nation*, 20 September 2019, 23; O. Guguyu, 'Treasury mandarins who burned economy with cooked figures', *Daily Nation*, 19 November 2019, 11; J. Kamau, 'Damning dossier: Why Uhuru scrapped Kimwarer dam deal', *Daily Nation*, 23 September 2019, 26.

[124] O. Guguyu, 'Kenyans pay heavily as bad managers loot State firms', *Daily Nation*, 14 January 2020, 12.

[125] J. Wangui and B. Wasuna, 'Maraga moves 42 judges in major Judiciary shake-up', *Daily Nation*, 26 September 2020, 6; B. Wasuna, 'Why Omtatah wants DPP to revive Karen land case', *Daily Nation*, 8 August 2020, 9.

[126] J. Kisero, 'Punish the Covid funds thieves', *Daily Nation*, 8 September 2020, 23; P. Lang'at, 'Raila takes the heat in Covid saga', *Daily Nation*, 24 August 2020, 3; S. Owino, 'Kemsa's hand in corrupt deals exposed', *Sunday Nation*, 21 February 2021, 8; 'Severely punish thieves of pandemic war cash', *Daily Nation*, 3 August 2020, 23.

[127] D. Mwere, 'Tough job ahead for new NLC team', *Daily Nation*, 19 September 2019, 5; D. Mwere 'Valuation report NLC used to pay Sh12.1bn for railway land goes missing', *Daily Nation*, 15 April 2021, 21; D. Mwere, 'NLC on the spot, yet again, over Sh135 million land', *Daily Nation*, 13 April 2021, 12; G. Mathenge, 'We did not deliver, says commissioner of NLC', *Daily Nation*, 4 February 2019, 16; D. Mwere, 'Bungling NLC cost taxpayers billions in irregular payouts', *Daily Nation*, 15 September 2020, 13.

[128] P. Leftie, 'EACC wants Auditor General charged over Sh100m tender', *Sunday Nation*, 8 January 2017, 7; K. Kimanthi, 'Hunt on for a new auditor as Ouko's term in office ends', *Daily Nation*, 27 May 2019, 7.

[129] S. Kiplagat, 'How MP Gachagua moved Sh12 billion in just seven years', *Daily Nation*, 13 October 2020, 12; J. Kamau, 'Detectives to prefer criminal charges against Rigathi Gachagua', *Daily Nation*, 23 October 2020, 3.

the President and his deputy were referred to the ICC. Being a high-profile public figure with knowledge of the likely evidence which ICC used to indict the two suspects, his death raised suspicion, which was intensified when samples collected from his body for testing abroad were tampered with.[130] A second extra-judicial murder involved Meshack Yebei, a defence witness for Deputy President William Ruto's case at the ICC. Prior to his disappearance and subsequent death, Yebei had reported receiving death threats. He disappeared on 28 December 2014, and his mutilated and decomposing body was found in March 2015 in the Tsavo National Park far away from his home in Turbo, Eldoret.[131]

The third case of extra-judicial killings under the Uhuru administration involved the murder of individuals suspected of association with the Somalia-based Al Shabaab terrorist group. During the first term of the administration, there was a surge in terror attacks on Kenya, leading the government to step up efforts to contain the attacks.[132] The Uhuru administration initially sought to use a judicial commission of inquiry to establish causes behind the spate of terror attacks, especially in the aftermath of the Westgate attack in September 2013. However, the administration shifted from this approach and instead adopted a more violent response involving extra-judicial killings and forced disappearances of terror suspects. In doing so, the administration followed a pattern which had been established under the preceding Kibaki administration, which had used violence in dealing with terror suspects. A prominent suspect killed under the Uhuru administration was Sheikh Abubakar Shariff, alias Makaburi on 1 April 2014.[133] The murder of controversial businessman Jacob Juma constituted the fourth prominent extra judicial killing under the Uhuru administration. Juma was found dead in his bullet-riddled car on Ngong Road in May 2016. At the time of death, Juma was involved in a legal dispute with government over a mining license.[134]

Perhaps the most controversial of high-profile extra-judicial killings under the administration was that of Chris Msando. At the time of his murder on the night of 27 July 2017, Msando was the IEBC data centre and infrastructure manager in charge of the digital vote counting

[130] V. Achuka, 'Fears of extra-judicial killings with State vowing to hit terrorists', *Daily Nation*, 18 January 2020, 12.
[131] N. Gisesa and M. Chelangat, 'Unsolved murders: High profile cases yet to be closed', *Daily Nation*, 27 September 2019, 26.
[132] N. Gisesa, 'How NIS regained Uhuru's trust and confidence', *Sunday Nation*, 19 January 2020, 9.
[133] Opiyo, 'Westgate'; 'Commission of inquiry that never was', *Sunday Nation,* 20 September 2014, 11–12; M. Ahmed, 'Tsavo becomes dumping ground for murdered men', *Daily Nation,* 24 February 2020, 11; V. Achuka and N. Gisesa, 'Where are our sons and fathers? Kin of terrorism suspects ask Kenyan officials', *Daily Nation*, 17 October 2020, 11; Gisesa and Chelangat, 'Murders'.
[134] J. Kamau, 'Jacob Juma'.

system for the presidential election. His body was found in a forest on the outskirts of Nairobi alongside that of a young woman. His death came on the eve of the 8 August 2017 election and the opposition coalition NASA claimed that the assassination was linked to the Uhuru administration's efforts to manipulate the 2017 presidential election. [135]

Murders and extra-judicial killings continued in the administration's second term, with increase in disappearances and discovery of bodies of murder victims. This led to suspicion that a special death squad had been set up within the National Police Service (NPS) to carry out murders and enforce disappearances. There were also cases of increasing police brutality, especially in carrying out containment measures put in place to deal with the COVID 19 pandemic from March 2020.[136]

6.3 Uhuru Administration and Vertical Accountability

By time the Uhuru administration ascended to power, the vertical accountability terrain in Kenya was widely variegated, having grown exponentially during the preceding Kibaki era. Although the three earlier traditional vertical accountability players, namely the faith-affiliated groups, the media and the labour movement still existed, they had been transformed by both internal and external changes. Internally, the three entities had seen further atomisation, which dispersed power further away from them. For instance, the rise of social media took away a huge chunk of the traditional power the mainstream media had wielded. On the other hand, increase in smaller evangelical congregations and televangelists mobilised crowds away from big, mainstream churches. As for the labour movement, the atomisation led to a break away from a single behemoth speaking for workers, leaving behind a multitude of workers' groups, each working independent of the other, and collectively being unable to play a significant role in vertical accountability.

Externally, the NGO component of civil society which had risen during the Moi era and thrived in the Kibaki era consolidated their hold over the vertical accountability space that had earlier been occupied by the three traditional vertical accountability actors. The NGOs

[135] Epstein, 'Cover-Up'.
[136] *Daily Nation*, 'Revealed: Killer police squad has blessings of top bosses', 10 May 2021, 11; M. Ahmed, 'At the coast, dozens go missing after dreaded visits by masked gunmen', *Daily Nation*, 24 November 2020, 10; V. Achuka, 'Unravelling mystery, return of Kenya's death squads', *Daily Nation*, 8 June 2021, 11; M. Wambui, 'Last seen in handcuffs, next in body bags: Why police are under scrutiny', *Daily Nation*, 4 June 2021, 12; J. Kiplangat and T. Matoke, 'All officers to be transferred from O'lessos Police Station', *Daily Nation*, 27 June 2020, 9; 'Punish police officers abusing curfew order', *Sunday Nation*, 29 March 2020, 23.

became more professional and focused on single issues, leading to atomisation in terms of groups which focused on governance issues vis-à-vis those which focused on other areas such as housing or health care.

In spite of the extensive changes in the vertical accountability terrain, however, there was still continuity in some areas. For instance, the faith-affiliated groups, although fragmented due to the changes, remained capable of causing discomfort to the Uhuru administration. As such, the administration cultivated cordial relations with sections of the faith-affiliated groups as a way of ensuring that the institutions remained friendly towards the administration. On the other hand, sections of the media, the labour movement and civil society were viewed with suspicion and thus had a more difficult relationship with the administration. This is discussed in the sections below.

Church under the Uhuru Administration

The Uhuru administration's relationship with the church, one of the faith-affiliated groups, was characterised by a conscious attempt to cultivate cordial relations. This was exhibited in two ways. First, the administration responded to a long-standing demand by one of the mainstream African indigenous churches, the AIPCA to have the 327 schools it lost to mainstream colonial-government affiliated churches during the colonial era returned to it. This was deemed highly controversial as it could pit the church against others but could be an indication of the degree to which the administration could go in trying to appease the institution.[137]

Secondly, during the Uhuru administration, there was constant courting of the church, both mainstream and evangelical for political purposes. This was exhibited through participation by top officials in numerous activities organised by the church. Sections of the administration, particularly the deputy president William Ruto made hefty contributions in churches spread across the country ostensibly to support them. This, however, led to allegations of corruption against the deputy president, with the churches roped in as his accomplices in the vice.[138]

The accusations that the church was complicit in government corruption was the only source of the mild conflict between the Uhuru administration and the church. To distance themselves

[137] J. Kamau, 'Schools?'
[138] R. Oudia, 'Cleric says he did not pray for Ruto to be president', *Daily Nation*, 14 October 2020, 13.

from the accusations, sections of the church, particularly the two big mainstream churches, Catholic and Anglican introduced new measures to contain the vice within their institutions. The Catholic Church compelled parents to renounce corruption on behalf of their children during the baptism of the children. The Anglican Church on the other hand required that those making financial contributions to the Church indicate the sources of their contribution.[139]

Media under the Uhuru Administration

The relationship between the media and the Uhuru administration was initially hostile, with the administration exhibiting disdain for the media by disparaging newspapers in public forums as only fit for wrapping meat. During the administration's first term, its treatment of the media fell into three patterns. The first pattern consisted of outright harassment of journalists and media personalities. Individual journalists such as the *Nation* writer Walter Menya and social media blogger Robert Alai were arrested and equipment confiscated but no charges were preferred against them.[140] A survey by an NGO working on media freedom called *Article 19* indicated that by the end of 2017, there had been a total of 110 cases of threats, expulsion, attacks, harassment, intimidation, arbitrary detention and arrests and physical attacks on journalists by mostly national security agencies.[141]

The second pattern adopted by the Uhuru administration against the media involved economic sabotage. The administration withdrew government advertisements from media houses, leading to financial difficulties for the media houses, which in turn not only led to job losses for many journalists, but also weakened the media as a vertical accountability actor.[142] The administration also engaged in the shutdown of media houses twice. The first shut down took place in 2015 and affected the country's three major TV stations, *NTV, KTN* and *Citizen.* The justification for the shutdown was that the affected stations had refused to comply with government's orders on digital migration. The stations had sought a delay to the migration, but government rejected the request, and instead shut the stations down for three weeks.[143]

[139] D. Luvega, 'Church ban on politics: Archbishop Jackson Ole Sapit stays put', *Daily Nation,* 13 September 2021, 11; Kweyu, 'Bishop'.
[140] Githae, 'Crackdown'.
[141] H. Maina, 'Why access to information and national security are not strange bedfellows', *Sunday Standard,* 4 February 2018, 12.
[142] J. Kisero, 'Pulling out government ads is killing private media; rescind it', *Daily Nation,* 3 June 2020, 23.
[143] T. Mshindi, 'Reassuring pledge to media as *Nation* goes digital', *Sunday Nation,* 6 September 2020, 24.

The second shut down took place in January 2018, in the aftermath of Raila Odinga's mock swearing in as the 'people's president.' The government shut down leading media houses for having aired the event and sought to arrest a number of media personalities.[144] Other institutions under the influence of the administration, particularly parliament also exhibited hints of intolerance towards the media, often locking journalists out of parliamentary business using flimsy reasons, mostly centred around sensitivities about national security.[145]

Nonetheless, there were some occasional gestures of friendliness towards the media under the Uhuru administration. These included occasional interviews which top administration functionaries granted to the media. A more significant act of friendliness from the administration towards the media took place in September 2020, during a function hosted by the Nation Media Group to adopt digital applications in its work. The administration was represented by Interior CS Fred Matiang'i who had incidentally presided over the two major shutdowns of the media, first as Information CS and later as Interior CS. The administration pledged to respect not just media freedom but also the constitutional provisions guarding the media in Kenya.[146]

Labour Unions under the Uhuru Administration

The Uhuru administration's relationship with the mother trade union, COTU, was cordial. The cordiality was mostly due to COTU's longstanding appendage to the executive. Its Secretary General Francis Atwoli remained friendly to the administration.[147] However, there were two developments which marked the relationship between the Uhuru administration and organised labour. First, the administration's Labour CS Kazungu Kambi attempted to get rid of Atwoli from COTU leadership. When the attempt failed, the Minister unsuccessfully instigated the formation of the Public Service Trade Unions of Kenya (PUSETU-K) to rival the COTU. He sought to divide the labour movement further by picking on Wilson Sossion, the Secretary General of the rival union, the KNUT, as the new entity's first chairman.

[144] Khobe, 'Drift'; 'The Kenyan crackdown continues. The U.S. needs to respond', *The Washington Post*, 6 February 2018 https://www.washingtonpost.com/opinions/global-opinions/the-kenyan-crackdown-continues-the-us-needs-to-respond/2018/02/06/ec6f1a42-0b70-11e8-8b0d-891602206fb7_story.html, (accessed on 3 August 2022).
[145] 'Answer for locking media out of crucial Senate sitting', *Daily Nation*, 19 August 2020, 23.
[146] Mshindi, 'Reassuring'.
[147] Akuma and Chacha, *Atwoli*, 115–119.

PUSETU did not gain much traction, however, and although it changed its name to the Trade Union Congress of Kenya (TUC-K), it was forced to fold up when the CS gave up on it.[148]

On the other hand, labour organisations which operated outside the ambit of COTU to champion the interests of their specific professions experienced hostility from the Uhuru administration. This was particularly the case for two major entities, namely the Kenya Medical Association (KMA) which represented doctors, and the KNUT, which represented teachers. The relationship between the administration and KMA worsened over a number of issues, the most significant of which was government's decision to employ Cuban doctors on contractual terms which were much better than those given to local doctors. Although the government argued that the foreign doctors were brought in to plug the deficit of medical doctors the country faced, the KMA felt that the move showed government's disregard for the welfare of local medical personnel.[149] The administration responded to KMA's rejection of its policies by suppressing the leadership of the trade union, including having the leaders of the union spend some days in jail, before eventually yielding to the union's demands.[150]

The main source of conflict between the KNUT and the Uhuru administration stemmed from the union's demand for a raise in pay for its members. To push the administration into acceding to its demands, the union successfully organised an unprecedented 5-week go-slow among teachers, leading to closure of public schools across the country. The go-slow was only resolved through a ruling by the Employment and Labour Relations court under Justice Mathews Nduma Nderi, which compelled the government to respect the Collective Bargaining Agreement (CBA) it had signed with the union on behalf of the teachers. In light of the ruling, teachers agreed to resume classes.[151]

Although the Uhuru administration accepted the court's ruling and instituted the CBA pay raise, it took deliberate steps to neutralise the union from future anti-government activities. Using the Teachers Service Commission (TSC) under its Chief Executive Officer (CEO) Nancy Macharia, the administration signed the CBA with both the KNUT and its rival union the Kenya Union of Post Primary Education Teachers (KUPPET) worth Kshs. 54 billion, which exponentially increased teachers' pay. However, the administration linked the pay

[148] Ibid, 117–118.
[149] V. Okeyo, 'How Cuban doctors deal was "hawked" to Uhuru', *Daily Nation*, 2 October 2020, 12.
[150] S. Kimuge, 'The making of women trade union leaders in Kenya', *Daily Nation*, 7 August 2019, 11; 'Sabotaging trade unions won't end health crisis', *Sunday Nation*, 31 January 2021, 23; F. Nyamai, 'Raila calls for Knut, TSC truce', *Daily Nation*, 7 January 2021, 12.
[151] Wangui and Wasuna, 'Shake-up'.

raise to having teachers renounce their affiliation to the KNUT. To make this easier, the administration introduced a digital portal through which teachers could renounce their KNUT membership. Upon clicking on the portal, the teachers received an immediate pay raise but also quit their KNUT membership. In addition, the administration stopped the TSC from remitting teachers' monthly contributions to the KNUT. It also had the TSC deregister the KNUT Secretary General Wilson Sossion as a teacher in a bid to push him out of the leadership of the union.[152]

The measures had debilitating effects on the KNUT. In the immediate aftermath of the measures, there was a mass withdrawal of teachers from the union, leaving it a shell of its former self. Its membership shrunk from 187,471 in June 2019 to 45,217 by September 2020, causing the union's monthly earnings to drop from Kshs. 144 million to Kshs. 32.9 million during the period. With the drop in earnings, the union became increasingly unable to finance operations in its 110 branches countrywide.[153]

In the long term, the measures led to deep wrangles and a leadership crisis within the KNUT. These came to the fore after the union rejected the CBA for its anti-KNUT clauses. Soon, pro-CBA and anti-CBA factions emerged in the union, with the pro-CBA faction advocating for acceptance of the CBA, while the anti-CBA faction, led by the beleaguered Sossion, rejected it. The wrangles soon resulted in a leadership tussle, with the pro-CBA faction keen on ousting Sossion from the union leadership. Eventually, Sossion left the union, announcing his resignation in June 2021. His departure left behind a union which had almost been annihilated by the Uhuru administration. Although the union's new leadership promised to restore it to its former position, this was highly unlikely. This was due to the fact that the union had been placed under the direct control of the administration, which through the TSC, enjoyed tremendous control over its active and potential membership.[154] Overall, the departure of Sossion left KNUT a shell, with the formation of rival breakaway groups such as

[152] F. Nyamai, 'Union in cash crisis as TSC sends just Sh25m', *Sunday Nation*, 1 November 2020, 7.
[153] D. Muchunguh, 'How TSC strategy reduced Knut to a shell', *Daily Nation,* 12 October 2020, 7–8; D. Muchunguh & V. Kimutai, 'Disquiet in crisis-torn Knut ahead of national elections', *Daily Nation*, 3 May 2021, 8.
[154] D. Muchunguh and F. Nyamai, 'Roaring teachers' union reduced to a whimper as funds dry up', *Sunday Nation*, 9 August 2020, 16.

the Kenya National Teachers Pressure Group in light of the increasing inability of the post-Sossion KNUT to effectively articulate teachers' concerns.[155]

Civil Society and the Uhuru Administration

Civil society was one grouping deliberately targeted for destruction by the Uhuru administration.[156] There were at least three reasons for the administration's hostile attitude towards civil society, when it gained power in September 2013. First, civil society organisations had been prominent in providing evidence and support to the ICC in the initial days when the Court was framing the crimes against humanity charges against the two main candidates, Uhuru Kenyatta and William Ruto, who later constituted the Uhuru administration. Secondly, a section of civil society had challenged the candidacy of the two candidates at the High Court prior to the 2013 elections, arguing that having been indicted for crimes against humanity by the ICC, the two were not fit to run for the country's highest political offices under the 2010 Constitution's Chapter Six. Thirdly, soon after the 2013 elections, a section of civil society was part of the petitioners who challenged the validity of the election.[157] These three actions by civil society were thus interpreted as being inimical to the Uhuru administration when it eventually ascended int power in 2013.

The Uhuru administration responded to the actions in four main ways. First, the administration deployed negative language against CSOs. Top administration personalities labelled civil society as 'evil society' and claimed that CSOs were agents of foreign masters who were detrimental to Kenya's sovereignty. The aim of the negative branding was to poison public perception against CSOs so as to reduce public support for the organisations. This would in turn make it easier for the administration to enact the anti-CSO changes it had lined up.

Secondly, the administration embarked on a massive campaign to reverse laws that had protected CSO operations in the preceding Kibaki era. This mainly targeted the Public Benefit Organisations (PBO) Act of 2013, which had been enacted by the Kibaki

[155] F. Nyamai 'TSC transfers Martha Omollo a day after she called for change of medical insurance scheme', *Sunday Nation,* 14 November 2021, 11; W. Menya, '"They fought me, now the unions are tamed": Sossion's "I told you so" moment', *Sunday Nation,* 10 October 2021, 24; F. Nyamai, 'Teachers to sue registrar for rejecting new unions', *Daily Nation,* 28 December 2021, 24; F. Nyamai and D. Muchunguh, 'Teachers face further split as new union formed', *Daily Nation,* 12 August 2021, 14.
[156] Onyando, *Quest,* 51.
[157] 'Kenya after the elections', International Crisis Group, 7.

administration, just before it left power. The Act was meant to empower the CSO sector and make it a fully legitimate part of Kenya's public sphere. The new Uhuru administration refused to implement the Act. Instead, it sought to extensively amend it. To spearhead the amendment, the administration set up a taskforce led by Sophia Abdi Nur, a former MP who incidentally had spearheaded the passage of the Act, to collect views aimed at the amendments. The taskforce lined up at least 54 amendments to the Act, most of them aimed at removing the special protections which the law offered to CSOs. Among the changes lined up included removing provisions which encouraged closer collaboration between the government and the CSOs, limiting the amount of funding available to CSOs to only 15% of their annual budget and prohibiting CSOs from directly receiving funding from donors, with all funds channelled through a proposed PBO Federation. In addition, the amendments sought to introduce a new governing body in the CSOs sector which would be equipped with extensive veto powers over CSOs.

Thirdly, the Uhuru administration attempted to enact specific laws aimed at curtailing the operations of CSOs. A prominent example of such laws was the Security (Amendment) Act of 2014, which sought to curtail press freedom and restrict NGO activity, with the justification that this was necessary in order to fight the rising cases of terrorism in the country. The Act was heavily contested by both CSOs and the political opposition under the banner of the Coalition for Reforms and Democracy (CORD). They successfully litigated against it in the High Court, leading to the most draconian sections of the proposed law being struck out as unconstitutional. Besides the Security (Amendment) Act of 2014, the administration also employed the Official Secrets Act to create a hostile environment for CSOs.

Fourth, the administration deployed the NGO Coordination Board, the CSO sector's main regulator, as a means of containing the CSOs. It appointed one Fazul Mohamed as the new CEO of the Board. Mohamed enacted several measures that were hostile to the day-to-day operations of CSOs. The first action he took was to reorganise the Board by removing professional staff and replacing them with handpicked staff who would do his bidding in the Board.[158] Secondly, Mohamed lined up a total 1,500 NGOs and CSO entities for deregistration. Most of the entities that fell in the deregistration list were either those which were active in campaigning for good governance across the country or those linked to

[158] 'NGOs board boss Fazul Mohamed out to silence State critics', *Daily Nation*, 15 August 2017, 9.

opposition politicians. Among the good governance CSOs targeted were the KHRC, the Africa Centre for Open Governance (AfriCog), Inuka Kenya, Katiba Institute and the MUHURI organisation. [159] As for organisations affiliated to politicians, those listed for deregistration included the Kalonzo Musyoka Foundation and the Key Empowerment Foundation Kenya, both of which were linked to opposition leaders Kalonzo Musyoka and Raila Odinga respectively. By contrast, Mohamed promoted organisations linked to pro-administration personalities. Two such organisations were the Sonko Rescue Team linked to Nairobi Senator Mike Sonko and the Margaret Kenyatta Foundation, linked to the First Lady.

In identifying organisations for deregistration, Mohamed cited money laundering, employment of foreigners without valid work permits, operating illegal bank accounts and funding political operations as reasons for deregistering the organisations. He also claimed that he was deregistering the organisations in order to ensure 'greater accountability and transparency amongst NGOs.'[160] Mohamed also shifted the NGO Board from its parent ministry at the Ministry of Devolution to the Ministry of the Interior and subjected CSOs to constant surveillance and direct intimidation through unannounced visits. In shifting the Board to the Ministry of the Interior, Mohamed turned CSOs into a security concern, thus subjecting their activities to constant attention by security agencies.

CSOs reacted to the hostile environment created by the Uhuru administration in various ways. First, they vigorously worked to protect the PBO Act of 2013 from destruction. They went to court and were granted at least two orders compelling government to operationalise the Act without any amendments. Although the Uhuru administration ignored the court orders, it nevertheless gradually stopped the attempts to amend the PBO Act.

Secondly, CSOs campaigned for Mohamed's removal as CEO of the NGO Board. Their efforts in this endeavour received support from at least one government checks and balances entity, the Commission of Administration of Justice (CAJ). The CAJ declared Mohamed unfit to lead the Board for having used fraudulent academic qualifications in applying for the job. Using this information, CSOs litigated against the CEO, asking the courts to declare him unfit for public office. Through Justice Hellen Wasilwa, the High Court directed Interior CS Fred Matiang'i against renewing Mohamed's contract due to the fraudulent academic certificate.

[159] F. Oluoch, 'EA govts using punitive laws to rein in civil society, gravely hurting democracy', *The East African*, 19 May 2019, 13; 'Mohamed', *Daily Nation.*
[160] Githae, 'Crackdown'.

This brought an end to Mohamed's tenure at the NGO Board.[161] Thirdly, CSOs used their international allies to highlight the hostile environment they were facing under the Uhuru administration, which led to an international outcry against the administration. To ease the international pressure, the administration, through Interior CS Fred Matiang'i, reversed most of the hostile actions lined up against CSOs.[162]

The hostile environment against CSOs eased somewhat during the Uhuru administration's second term. This can be attributed to the administration's shift from the ICC to the succession politics of 2022. With the shift, the administration had less incentives to curtail the work of CSOs, and consequently its attitude towards CSOs improved significantly. This was exhibited most significantly in early 2020 during the launch of the NGO Sector Report for 2018/2019. The administration, through Interior CS Fred Matiang'i, pledged the administration's commitment towards implementing the PBO Act of 2013. Although the Act remained unimplemented and there were sporadic acts of hostility from the administration against CSOs, the pledge nonetheless represented an important change in the administration's attitude towards CSOs.[163]

In conclusion, the Uhuru administration's relationship with vertical accountability institutions involved at least three stances. The first stance consisted of co-optation and deliberate cultivation of friendly relations with influential vertical accountability actors. This stance mostly targeted the church and ensured that except for a few insignificant spats, the administration did not face any major challenge from the church. The second stance involved outright hostility towards certain actors in the vertical accountability terrain. This stance mostly targeted CSOs and was ignited by the ICC cases which the administration faced early in its tenure. The hostility was vigorously fought off by the CSOs using the empowering changes of the 2010 Constitution. It eventually eased off when the administration's incentives shifted away from the ICC cases to the succession politics of 2022. The third stance involved direct confrontation between the administration and workers' unions. Two unions which faced direct confrontation were the KMA and the KNUT. Of the two unions, the KNUT emerged worse off, with its membership totally subverted under the direct control of the

[161] J. Zawadi, 'NGOs board director Fazul Mohamed hit by hiring, funds scandal', *The Star*, 25 July 2016, 9; D. Wabala, 'Uhuru appointee Fazul Mohamed's Degree is Fake', *The Star*, 9 November 2015, 11.
[162] 'Crackdown', *The Washington Post*; Khobe, 'Drift'.
[163] M. Wambui and G. Nyambega, 'Police disrupt Saba Saba protests in the city', *Daily Nation*, 7 July 2020, 12; C. Onyango-Obbo, 'The Saba Saba day: A Kenyan tale and African story (Part 2)', *Daily Nation*, 15 July 2020, 24.

administration's agency, the TSC. The three stances together demonstrated the capabilities of the administration in managing the vertical accountability terrain. These included neutralising potentially influential actors, instituting hostile measures against some actors and complete destruction of other actors when they challenged the administration. This is the situation the LSK confronted in its relationship with the administration, as analysed in the following section.

6.4 LSK's Reactions to the Uhuru Administration

By the beginning of the Uhuru Kenyatta tenure in August 2013, the LSK was facing two major realities which had risen out of the 2010 Constitution. The first centred on the massive legal work which the Constitution had created, and which required LSK's attention. The Constitution had rebooted the organisation, further expanding its role in advancing the rule of law in the country. The LSK Act 2014, which was enacted in response to the new Constitution, re-emphasised LSK's role in upholding constitutionalism, advancing the rule of law and facilitating the administration of justice. The Act also emphasised LSK's role in protecting and assisting the public in matters of the law, in addition to protection of public interest and maintenance of integrity and professionalism.[164]

The second reality involved the challenges to the rule of law which arose from the actions of the new Uhuru administration, especially in light of the new Constitution. The LSK was hence expected to respond to both realities by recognising its expanded mandate and providing vigilance over the new administration.[165] Indeed, the organisation responded to the expectations by undertaking numerous actions to restrain the Uhuru administration from a number of excesses. These can be categorised broadly into actions geared towards first, the protection of the Constitution, secondly, the defence of judicial independence, and thirdly, the promotion of the rule of law in general.

Protection of the Constitution was one of the main priorities for the LSK during the Uhuru administration. The organisation's active engagement in this direction commenced in November 2015 when its chairman Eric Mutua constituted a 35-member committee mandated with checking the powers of both the executive and parliament with regard to the

[164] 'The Law Society of Kenya Act, Special Issue No. 170 (Acts No. 21)', *Kenya Gazette Supplement, 2014*, Nairobi: Republic of Kenya, 2014, 387.
[165] Nowrojee, 'Profession', 52–56; Ghai and Ghai, *Order;* 'The Law Society of Kenya Act, 2014', *Kenya Gazette Supplement, 2014*, 387.

new Constitution. The committee was to respond to the growing habit of ignoring court orders and violation of constitutional clauses by both institutions. The committee was led by constitutional lawyers P. L. O. Lumumba and Gibson Kamau Kuria. It consisted of lawyers with a history of restraining the state, among them Paul Muite, Ahmednassir Abdullahi, Nzamba Kitonga, Lee Muthoga, John Khaminwa and Gitobu Imanyara.[166]

Mutua's immediate successor, Isaac Okero as well as his own successor Allen Gichuhi maintained the protection of the Constitution as a priority for the LSK. The two LSK presidents led the organisation in documenting all laws which had been declared by the courts as inconsistent with the new Constitution and worked with parliament to have them amended or removed from the statute books. One such law had directed that convicts who were minors or had mental problems should serve their sentences at the President's pleasure. The law had been declared inhumane and inconsistent with the Constitution by the High Court. Using this declaration, the LSK worked to have it removed from statute books. [167]

Under Gichuhi's successor Nelson Havi, the LSK engaged in two specific actions aimed at protecting the Constitution. The first action challenged the administration's attempts to water down the independence of constitutional commissions. The administration had used an executive order to place the commissions under executive control. The Havi-led LSK went to court and had the order set aside.[168] The second action involved a march on parliament in October 2020, dubbed 'Occupy Parliament'. This was in the wake of an advisory from the Chief Justice David Maraga to President Uhuru Kenyatta to dissolve parliament due to its failure to enact the two-thirds gender rule as directed by the Constitution. Prior to the march, Havi had led LSK in issuing a number of directives demanding parliament's dissolution, including writing to the Treasury and the Ministry of Internal Security, and instructing the two institutions against dealing with sitting MPs.[169] However, the action failed to get the desired effect when both the President and parliament ignored not just the LSK demands, but also the advisory from the Chief Justice. Havi himself became a butt of jokes, with sections

[166] A. Ochieng, 'LSK forms committee to promote protection of the Constitution', *Daily Nation*, 16 November 2015, 16.
[167] A. Ochieng, 'Inmates: Jail us at President's pleasure? No way!' *Daily Nation*, 5 December 2018, 18.
[168] M. Kakah, 'LSK challenges Uhuru's executive order on independent commissions', *Daily Nation*, 22 June 2018; M. Kakah, 'LSK files suit against Uhuru's Executive order', *Daily Nation*, 20 June 2020, 13; J. Wangui, 'Court suspends Uhuru's Executive Order on independent commissions', *Daily Nation*, 3 August 2020, 2.
[169] J. Wangui, 'Judge declines to stop planned LSK protest', *Daily Nation*, 8 October 2020, 6; P. Lang'at, 'LSK says President has until October 12 to dissolve Parliament', *Daily Nation*, 24 September 2020, 12; G. Warigi, 'Lawyers, just leave legislation to legislators', *Sunday Nation*, 4 October 2020, 24.

of the public ridiculing him for having accepted an invitation to a cup of tea by the National Assembly clerk Michael Sialai at the end of his well-publicised march on parliament.[170]

Besides protection of the Constitution, the LSK also prioritised the promotion of judicial independence. To this extent, the organisation undertook at least four measures. First, it issued numerous public pronouncements in support of the judiciary and denounced moves aimed at undermining the institution's independence. Prior to the 2017 elections when the judiciary faced immense pressure by both government and the political opposition over preparations for that year's general election, LSK through its president Isaac Okero mobilised a committee of senior counsel who reprimanded government for constantly attacking the judiciary.[171]

In the wake of the nullification of the August 2017 presidential election which ignited an intense wave of hostility against the judiciary from the Uhuru administration, Okero issued a statement directly castigating President Uhuru for leading attacks against the Supreme Court judges who had nullified the election.[172] When the conflict between the judiciary and the Uhuru administration deteriorated further in the last days of David Maraga's tenure as Chief Justice, the Havi-led LSK sided with the judiciary. In June 2020 when Maraga complained publicly of the mistreatment of the judiciary by the Uhuru administration, Havi led the LSK in not only siding with Maraga but also in threatening to remove the AG Paul Kihara and Solicitor-General Kennedy Ogeto from the roll of advocates, accusing them of enabling the President to mistreat the judiciary.[173] The second area of promoting judicial independence involved fighting off the Uhuru administration's attempts to take over the JSC. The administration was keen to control the Commission in order to use it to subvert the judiciary, given the centrality of the Commission in the management of the judiciary.[174]

The administration engaged in at least two moves within the JSC which caused concern over the Commission's independence. The first move involved the arrest in late 2018 of Tom Ojienda, the LSK representative in the Commission. The administration claimed that Ojienda

[170] I. Oruko and S. Otieno, 'Tea mutes gender activists' bark', *Daily Nation,* 13 October 2020, 6.
[171] D. Mwere, 'LSK accuses Uhuru of intimidating Judiciary', *Daily Nation,* 10 July 2017, 9; I. Oruko, 'Senior counsels caution Uhuru over threats to Judiciary', *Daily Nation*, 14 July 2017, 13.
[172] *Sunday Nation*, 'Insults'.
[173] 'Lawyers threaten to expel AG, Ogeto from the roll of advocates', *Daily Nation*, 13 June 2020, 9.
[174] S. Kiplagat, 'Maraga saga linked to succession wars', *Daily Nation,* 9 June 2020, 12.

had been arrested for having caused Mumias Sugar Company to lose Kshs. 200 million.[175] The second move involved the administration's refusal to gazette appellate judge Justice Mohamed Warsame as a member of the JSC, even after it had been directed to do so by the courts.[176] The LSK responded to both moves by denouncing them as aimed at having the administration take over the JSC. It linked both moves to the elections to reconstitute the JSC, which were to take place shortly. The LSK claimed that the administration was aiming to impose on the JSC representatives that would be friendly to the executive.[177]

The third area for promoting judicial independence in which the LSK was actively engaged was judicial financing. The judicial budget faced severe cuts, especially in the wake of escalating conflict between the administration and the Maraga-led judiciary. [178] In response, the LSK, led by Allen Gichuhi wrote to both houses of parliament, the AG, the Chief Justice and the Council of Governors, listing at least 10 areas which had been affected by cuts to the judiciary's budget. The aim of the letter was to call on the Uhuru administration to reverse the budget cuts. To ensure total judicial independence from the executive and parliament, Gichuhi called for establishment of an independent judiciary fund. With Havi's election as LSK president in early 2020, the LSK escalated the matter further by suing the Uhuru administration over the budgetary cuts.[179]

The fourth area for promoting judicial independence consisted of denunciation of the Uhuru administration's defiance of court orders issued by the judiciary. In February 2018, under the leadership of Okero, the LSK threatened to stage a 5-day yellow ribbon march to protest at the development. Further, it condemned the crackdown on civil society organisations, especially in the light of the 2017 elections. The Uhuru administration ignored the threat and continued to defy court orders.[180] Defiance of court orders continued unabated into the tenure of Nelson Havi as LSK president. In response, the Havi-led LSK stepped up actions against

[175] W. Menya and M. Kakah, 'Detectives arrest lawyers Ojienda and Peter Wanyama', *Daily Nation,* 28 December 2018, 4; J. Muinde, 'Tom Ojienda denies filing fake Mumias Sugar cases', *Daily Nation,* 29 December 2018, 5.
[176] M. Kakah, 'Lawyers' body sue over Uhuru's failure to gazette Mohammed Warsame's JSC appointment', *Daily Nation,* 5 September 2018, 6.
[177] Menya and Kakah, 'Ojienda and Wanyama'; Muinde, 'Ojienda'; Kakah, 'Warsame'.
[178] Ochieng, 'DP Ruto promise'; A. Kitimo, 'Crisis looms in Judiciary as budget cut by 50pc', *Daily Nation,* 18 October 2019, 12; P. Muyanga, 'David Maraga opposes adjournments of graft cases', *Daily Nation,* 9 August 2018, 5; C. Ang'asa, 'Judiciary out of limbo as Treasury restores funds', *Daily Nation,* 7 November 2019, 2.
[179] 'Lawyers tell CJ to reject blackmail over budget cut', *Sunday Standard,* 26 January 2020, 8; E. Matara, 'LSK sues CS Yatani over budget cuts, says Judiciary will suffer', *Daily Nation,* 26 October 2019, 9.
[180] J. Kahongeh, 'Miguna, Moses Kuria cases add to long list of defied court orders', *Daily Nation,* 13 January 2020, 12; L. Franceschi, 'Kenyatta-Maraga contest designed in precolonial Kenya', *Daily Nation,* 4 September 2020, 26.

the administration for this stance. In light of the President's refusal to appoint 41 judges recommended by the JSC in March 2020, the LSK reacted by not only condemning the President for the move, but also mounted pressure to compel the President into making the appointments.[181]

The pressure mounted included suing the government in court for refusing to make the appointments and directly taking the AG Paul Kihara to task over government's refusal to obey court orders. The LSK also compiled a list of all instances of defied court orders, from which it would then seek to have officers directly implicated in the defiance declared unfit to hold public office. From this action, the LSK hoped to use either county assemblies or parliament to have the officials removed from office.[182] However, the Uhuru administration shrugged off the pressure. When it eventually made the appointments in June 2021, it excluded six judges, accusing them of having been found to have issues of integrity by an NIS investigation.[183]

However, it should be noted that in its intervention to support the judiciary against executive manoeuvres, the LSK did not raise much concern with corruption within the judiciary. Part of the reasons the Uhuru administration gave for intervening in the judiciary was to stem what it said was runaway internal corruption in the institution. Yet LSK intervened on judicial corruption only once when it asked for further investigations into the conduct of a judge caught on tape in a compromising situation with one of the respondents appearing in a case he was presiding over.[184]

Beyond promoting the Constitution and defending the judiciary, the other priority area for the LSK was protecting the rule of law in general. Under the Uhuru administration, there were many acts of impunity which drew the attention of the LSK. Under Eric Mutua, the body mounted pressure on the AG Githu Muigai, threatening to remove him from the roll of honour for what the LSK said was poor handling of a case involving payments to the Anglo-

[181] F. Nyamai, 'LSK to march against State's law disregard', *Sunday Nation*, 11 February 2018, 14; P. Ogemba, 'Lawyers sue President Uhuru Kenyatta over judges', *Daily Nation*, 10 July 2014, 12.
[182] C. Wanyoro, 'Lawyers from Mt Kenya support CJ Maraga's call to swear in 41 judges', *Daily Nation*, 15 June 2020, 13; J. Wangui, 'Why LSK is mounting pressure for Uhuru to appoint 41 judges', *Sunday Nation*, 19 July 2020, 14.
[183] Kahongeh, 'Miguna'.
[184] M. Bashir, 'LSK calls for investigations into video leaked by former Governor Sonko', *Citizen Digital*, 19 November 2021, https://www.citizen.digital/news/lsk-calls-for-investigations-into-video-leaked-by-former-governor-sonko-n287286, (accessed on 23 January 2022).

leasing case, leading to a hostile judgment against the Kenyan state and a loss for Kenyan taxpayers.[185]

Under Mutua's successor, Isaac Okero, the LSK protested at general insecurity and extra-judicial killings, including those targeting LSK members. It also challenged the administration's amendments to the Insurance Act, which capped damages in respect to passengers in motor vehicle accidents at Kshs. 3 million. In addition, the organisation unsuccessfully contested the payments which the administration sought to make to Anglo Leasing linked entities.[186]

Other areas of the rule of law over which the LSK challenged the administration included protesting the biased composition of the public service, the imposition of a prolonged curfew on Lamu County ostensibly to stem terrorist threats, and the violation of consumer rights through sale of contaminated meat to consumers. It also challenged the merger of three state agencies involved in rail, ports and pipeline services to form one state entity and the formation of the Nairobi Metropolitan Services (NMS), both of which it considered as having been done without following the law.[187]

During the tenure of Allen Gichuhi, LSK actions against rule of law violations included protesting the arrest of suspects on Fridays with the intention of holding them over the weekend without charging them. They also included challenging the Ministry of Transport over its proposal to allow hawkers in the streets of Nairobi and suing the DPP and DCI to bar them from arresting lawyers in the course of their work. Further LSK actions in protest of the rule of law violations consisted of petitioning parliament to probe Lands CS Faridah Karoney for the way she was managing the land docket, suing government over the internet tax on the

[185] 'Rule of Law', *Citizen TV*.
[186] J. Ochieng', 'Revealed: What killed Mumias Sugar manager Ronald Lubya', *Daily Nation*, 7 June 2017, 13; D. Muchui, 'LSK says shooting of Meru lawyer linked to land row', *Daily Nation*, 4 September 2020, 12; B. Amadala, 'Lawyers to hold peaceful demo over insecurity in Kakamega', *Sunday Nation*, 8 March 2020, 13; 'Why LSK challenged new insurance law', *The Advocate*, 1, No. 1. August 2014, 19; 'Bursting Anglo Leasing ghosts', *The Advocate*, 1, No. 1. August 2014, 6–7.
[187] G. Bocha, 'Kenyan judge shamed for "worst" ruling', *Daily Nation*, 8 June 2017, 16; A. Magut, 'Bad meat exposé: LSK calls for action against supermarkets', *Daily Nation*, 16 July 2019, 6; J. Wangui, 'LSK fights ex-judge's new role at chair Tax Appeals Tribunal', *Daily Nation*, 25 April 2020, 9; J. Wangui, 'LSK challenges Uhuru decision to merge three State agencies', *Daily Nation*, 24 September 2020, 5; C. Omulo, 'Nairobi Metropolitan Services now a public office', *Daily Nation*, 3 June 2020, 7; N. Gisesa, 'Judge revises decision, declares NMS legit', *Daily Nation*, 19 September 2020, 8.

basis that it violated the freedom of expression and protection of over 60,000 families living in the Mau forest from eviction.[188]

During the tenure of Nelson Havi, LSK actions against rule of law violations expanded exponentially. Perhaps the biggest rule of law challenge during the Havi tenure was linked to the outbreak of the COVID 19 pandemic. In response to the pandemic, LSK engaged in a number of actions aimed at curbing government excesses linked to the outbreak. These actions included demanding that the government develops and disseminates a COVID response plan, especially after it failed to quarantine 239 passengers who arrived from China at the height of the outbreak in early March 2020.[189] Secondly, the LSK proposed a raft of measures to save the economy from the negative effects of the pandemic. Thirdly, it fought some of the draconian measures which the government came up with to curb the spread of the virus, including successfully demanding for the reopening of some critical rule of law institutions such as the judiciary, advocating for the extension of curfew hours, challenging the banning of political gatherings and demanding an end to the use of brutal force by the police in enforcing the COVID curfew.[190]

Besides actions in response to the outbreak of the COVID 19 pandemic, other actions of the Havi-led LSK in response to violations of the rule of law under the Uhuru administration consisted of calling for an end to extra-judicial killings and challenging the Ministry of Interior for forcing Kenyans to acquire a new identification document under a government initiative called Huduma number.[191] The organisation also contested some government appointments, sought to have a chief arrested for pouring a jerrycan of traditional liquor on a

[188] S. Kiplagat, 'Tom Ojienda arrest: LSK plans petition on police processes', *Sunday Nation*, 30 December 2018, 12; S. Kiplagat, 'LSK wants Maraga compelled to create weekend and holiday courts', *Daily Nation*, 14 January 2019, 8; M. Kakah, 'LSK asks court to shield lawyers from DPP, DCI harassment', *Daily Nation*, 14 January 2019, 7; V. Kimutai, 'Lawyers in bid to stop Mau forest evictions', *Daily Nation*, 31 August 2019, 12; D. Mwere, 'LSK wants Karoney probed by Parliament', *Daily Nation*, 3 February 2020, 9; A. Ochieng, 'Lawyers: why closure of land registries hurts us', *Daily Nation*, 28 February 2020, 9; J. Kubania, 'LSK sues govt over internet tax, says rights violated', *Daily Nation*, 2 October 2018, 12.

[189] M. Kakah, 'Coronavirus in Kenya: LSK pushes for contingency plan', *Daily Nation*, 16 March 2020, 9.

[190] A. Ochieng, 'Coronavirus: Inside lawyers' plan to save the economy', *Daily Nation*, 23 March 2020, 4; B. Wasuna, 'Nelson Havi: My reign at LSK, Westlands MP bid and why I'll never work with CJ Martha Koome', *Daily Nation*, 15 September 2021, 14; J. Openda, 'Why lawyers want Judiciary reopened amid coronavirus curfew', *Daily Nation*, 28 March 2020, 6; S. Kiplagat, 'Court declines to declare curfew illegal, exempts LSK and Ipoa', *Daily Nation*, 16 April 2020, 13; J. Wangui, 'LSK challenges State curfew in court', *Daily Nation*, 30 March 2020, 12; P. Mburu, 'LSK to challenge new rule on gatherings in court', *Sunday Nation*, 11 October 2020, 12; M. Kakah, 'State, LSK differ on publishing police's role during curfew', *Daily Nation*, 3 April 2020, 5.

[191] M. Wambui and S. Otieno, 'Hassan Nandwa abduction: Lawyers go for Fred Matiangi, Karanja Kibicho', *Daily Nation*, 9 November 2021, 6; W. Owino 'LSK President Nelson Havi to challenge roll out of teacher refresher courses by TSC', 26 September 2021, 7.

disabled woman suspected of having made the liquor and challenged the decision by the EACC and the IEBC to bar impeached governors Mike Sonko and Ferdinand Waititu from running for elective office, insisting that only the courts had powers to make such a decision.[192]

From the foregoing, it can be argued that the LSK under the leadership of the three LSK presidents whose tenures coincided with the Uhuru administration engaged in work aimed at the three critical priorities of defending the Constitution, protecting the judiciary and challenging acts of impunity in general. This begun under the tenure of Isaac Okero, slowed somewhat under Allen Gichuhi and expanded exponentially under Nelson Havi. With a robust LSK which constantly challenged government, it inevitably attracted attention from the Uhuru administration. The following section considers this attention.

6.5 Uhuru Administration's Response to LSK

The era of the Uhuru administration was a busy period for the LSK. The organisation engaged in three priority actions aimed at restraining the administration from excesses. These were the defence of the new Constitution, protection of judicial independence and generally challenging acts of impunity. The priority actions were in themselves driven by the changes brought about by the 2010 Constitution, which the Uhuru administration was expected to implement. In focusing on the three priority actions, the LSK drew inevitable attention to itself from the Uhuru administration, with the administration becoming keen on discouraging the organisation from challenging its excesses. The administration deployed at least four tactics in doing so.

The tactics were similar to those deployed by previous administrations, more so the Moi administration, in dealing with the LSK. They consisted of bad-mouthing the organisation, influencing the leadership of the organisation through sponsoring a pro-administration candidate in the LSK elections, attempting to co-opt the organisation's leadership, undercutting the organisation's economic base by sabotaging the income of its members, and displaying outright hostility to the organisation's leadership.

[192] E. Ondiek, 'LSK faults Fred Matiang'i on Huduma Namba deadline', *Daily Nation*, 17 May 2019, 13; S. Kiplagat, 'Court suspends appointments of four members to Tourism board', *Daily Nation*, 13 August 2020, 14; T. Ominde, 'LSK to file lawsuit over attack on disabled woman', *Daily Nation*, 16 April 2020, 10; S. Rutto, 'Only court can bar ex-governors from city poll, says Havi', *The Standard*, 1 January 2021, 11.

The bad-mouthing of the LSK manifested itself more strongly during the conflict over judicial independence, the organisation's second priority area. This conflict was at its most intense in the aftermath of the Supreme Court nullification of the August 2017 presidential election. Immediately after the nullification, President Uhuru directly insulted the Supreme Court judges, referring to them as thugs. In reaction, LSK issued a statement urging the President to stop attacking the judges, arguing that this was undermining judicial integrity.[193] In retaliation, the Senate majority leader Kipchumba Murkomen not only accused the Isaac Okero-led LSK of being sympathetic to the political opposition, but he also branded it 'a tyrannical monolith that speaks for a small part of its constituency and does not listen to the rest of it.'[194]

Influencing of the organisation's leadership through planting pliable candidates took place in the LSK elections of late 2017 aimed at replacing Isaac Okero. During the elections, the administration's hand was seen behind the candidature of Allen Gichuhi, one of the main candidates in the election for the organisation's presidency. Gichuhi prevailed after one of his top rivals, Nelson Havi was barred from participating in the election due to age-related factors.[195] Gichuhi's tenure was marked by silence towards the excesses of the administration. Due to this, a perception emerged, especially based on accusations from Gichuhi's critics, that he had facilitated the co-optation of the LSK into the Uhuru administration. This perception was further consolidated when the Uhuru administration conferred on Gichuhi a presidential award, the Elder of the Order of the Burning Spear (EBS).[196]

Gichuhi denied the accusations of facilitating the co-optation of the LSK into the government. Instead, he claimed that he had worked 'quietly' to achieve a list of promises he had given during his campaign for the LSK presidency.[197] Similarly, the administration was accused of attempting to co-opt the LSK President Nelson Havi. This was in light of the

[193] Onyando, *Quest*, 63.
[194] 'Insults', *Sunday Nation*.
[195] W. Menya, 'New political battle unfolds days to LSK polls', *Sunday Nation*, 18 February 2018, 9; E. Kwamboka and K. Muthoni, 'This man Havi: Is he the small axe felling big trees?' *The Standard*, 22 September 2020, 17.
[196] J. Wangui, 'Activist Okiya Omtata eating our lunch, "hungry" lawyers complain', *Daily Nation*, 2 July 2018, 4; A. Wambulwa, 'Make Omtatah an honorary member of LSK, advocate urges', *The Star*, 2 July 2020, 5; V. Raballa, 'Key issues for 4 candidates eyeing LSK presidency', *Daily Nation*, 25 January 2020, 9; Sihanya, Interview.
[197] E. Kwamboka, 'Under fire president denies claims he killed lawyers' body', *The Standard*, 18 January 2020, 12.

LSK's demand that President Uhuru Kenyatta appoints the 41 judges presented to him by the JSC, but who he had refused to appoint. In order to water down the LSK's demand, Havi claimed that administration operatives had tried to compromise him on the demand. However, he resisted the overtures and insisted on the appointment of the judges.[198]

Attempts to undercut the LSK's economic base were manifested in a directive issued on 7 July 2020 by the Head of Public Service Joseph Kinyua. In the directive, the administration instructed all state agencies to cancel contracts with lawyers not approved by the AG. Critics interpreted this as a retaliatory measure against the LSK in light of the organisation's threats to strike the AG and the Solicitor-General from the roll of advocates for failing to properly guide the Uhuru administration against violating the law. The LSK responded to the directive by terming it illegal, stating that the AG had no role in the procurement of legal services by government agencies.[199]

Hostility towards the LSK leadership was exhibited especially towards the LSK President Nelson Havi during the state burial of former LSK chairman Nzamba Kitonga. During the preparations for the burial, Internal Security CS Fred Matiang'i sidestepped Havi and the existing LSK leadership and instead appointed former LSK chairman Fred Ojiambo and lawyer Philip Murgor to coordinate the burial plans. This was seen as a display of government hostility towards the LSK and was linked to the fact that the Havi-led organisation was at the time opposed to several government initiatives.[200]

The pattern of confrontation and co-optation which emerged in the relationship between the Uhuru administration and the LSK severely tested the organisation's collective resilience. It exacerbated a number of internal weaknesses within the organisation, which weakened its ability to restrain the Uhuru administration from excesses. These internal weaknesses ranged from persistent challenges from previous eras to new challenges under the Uhuru Kenyatta era. One of the old persistent challenges was the division within the LSK along political and

[198] B. Wasuna, 'Nelson Havi: My reign at LSK, Westlands MP bid and why I'll never work with CJ Martha Koome', *Daily Nation*, 15 September 2021, 19.
[199] W. Menya and J. Wangui, 'Lawyers fight directive barring lucrative government tenders', *Sunday Nation*, 19 July 2020, 7.
[200] 'Another week of fights at LSK', *Sunday Nation*, 15 November 2020, 9.

ethnic lines, which had emerged during the Kibaki era, and which had muted the organisation's strong Moi-era voice.[201]

As had been earlier under the Kibaki administration, one part of the organisation was sympathetic to the government, while another part was sympathetic to the political opposition. The LSK struggled to speak through this division.[202] The division manifested itself most during the tenures of both Isaac Okero and Allen Gichuhi. During Okero's tenure, in many cases of disagreement between the LSK and the Uhuru administration, the LSK leadership was countermanded by another section of the leadership, which disagreed with its official positions. Okero was thought to be closer to the political opposition, and thus failed to command support from the section of the organisation which was sympathetic to government.[203]

Under Gichuhi, the LSK swung into the opposite direction, with Gichuhi being seen as sympathetic to government and thus unable to command the support of the LSK section which was sympathetic to the political opposition. In both cases, the LSK failed to command the public's attention, losing out to individual public-spirited activists that took on the role of restraining the state, which was expectedly the forte of the organisation.[204] The organisation even attracted some competition from a rival organisation called *Chama Cha Mawakili* (the Kiswahili name for the LSK) which emerged to claim that it was replacing the LSK, which it accused of elitism.[205]

It was only until the tenure of Nelson Havi in late 2020, itself happening in a background of a shift in incentives in the Uhuru administration from ICC to the 2022 succession politics, that the hold of ethnic and political divisions on the LSK was gradually overcome. Attracting one of the strongest support in LSK elections by receiving a total 2,675 votes, Havi was seen as

[201] T. O. Ojienda, 'The Legal Profession in 2015: Rethinking the Challenges, Opportunities and Threats', *The Law Society of Kenya Journal* 1, No. 2 (2005): 19–55; W. Menya, 'LSK council moves to put house in order', *Sunday Nation,* 29 October 2017, 23; A. Mboya, 'The Bar: Challenges and Opportunities', in *The Legal Profession and the New Constitutional Order in Kenya*, 241-252; Sihanya, Interview.
[202] S. Muyesu, 'Battle for the Soul of the Judicial Service Commission', *The Nairobi Law Monthly* 11, No. 2 (2019): 31.
[203] W. Menya, 'New political battle unfolds days to LSK polls', *Sunday Nation,* 18 February 2018, 12; K.O. Kipchumba, 'LSK an ivory tower and elitist', *The Star,* 12 February 2018, 10.
[204] E. Ondieki, 'Public interest litigants or defenders of Constitution?' *Sunday Nation,* 18 October 2017, 25; V. Achuka, 'High bills: How Kenya Power staff stole from you', *Daily Nation,* 28 June 2019, 11; Sihanya, Interview; M. Mutua, 'Omtatah, the people's advocate', *Sunday Nation*, 24 October 2021, 24; Wangui, 'Omtata'; G. Mosoku, 'Activist Omtatah scoffs at LSK's criticism for "stealing their job"', *The Standard,* 4 July 2018, 12.
[205] J. Wangui, 'Inside LSK's turf war with rival group over name', *Daily Nation,* 9 April 2020, 11.

neutral in the emerging political formations in the aftermath of the 'handshake' between President Kenyatta and opposition leader Raila Odinga.[206] Besides division along political and ethnic lines, indiscipline in the LSK membership emerged as a new challenge for the organisation. The challenge related to a broad range of issues which lawyers affiliated to the LSK engaged in, and which made the organisation unable to command public trust and the respect necessary for it to act as a restraint on the Uhuru administration.[207] These issues included cases of lawyers suspected of compromising sections of the judiciary, and others who fought state efforts to combat money laundering through the Finance Bill 2019. The Bill sought to have lawyers disclose to authorities the monies they handled on behalf of their clients. However, a section of lawyers resisted the Bill on the account that it would distort the relationship between the lawyers and their clients.[208]

Related to this, there was the challenge of corruption, both within the LSK and among some of the organisation's prominent members. Internally, corruption was thought to have infiltrated the organisation, with its leadership increasingly becoming influenced by money. This was the case, for instance, in the election of the LSK representative in the JSC. During the campaigns leading to the election, one of the candidates rolled out an expensive campaign that deployed money to influence the LSK membership to vote for him. However, the candidate did not disclose the source of the campaign money, leading to suspicion that it was corruptly acquired.[209] On its part, the LSK council, which acted as a candidate vetting body accepted all candidates, including those who were facing formal charges of corruption. This allowed the DPP to almost disrupt the election when he arrested one of the leading candidates for the JSC representative post. Although the election went ahead and a representative to the JSC chosen, it called into question the organisation's commitment to fighting corruption.[210]

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[206] Wasuna, 'Havi'; K. Ngotho, 'Clout'; Sihanya, Interview.

[207] R. Mbula 'How rogue lawyers use farmers' details to steal from sugar firms', *Daily Nation*, 10 January 2022, 11.

[208] S. Owino, 'Lawyers suffer setback in money laundering bill', *Daily Nation,* 24 December 2021, 15; B. Wasuna, 'Cliff Ombeta and the Akasha connection', *Daily Nation*, 8 August 2020, 13; J. Ochieng, 'Tom Ojienda asks Parliament to withdraw Finance bill', *Daily Nation*, 19 June 2019, 14; P. Mwangi, 'Why graft kingpins should now fear lawyers', *Daily Nation*, 4 May 2019, 24.

[209] W. Menya, 'Lavish campaigns as vote for JSC slot looms', *Sunday Nation,* 5 May 2019, 22; P. Mwangi, 'Cartels in the legal profession. How lawyers are actors and accessories to corruption', *Sunday Nation*, 13 January 2019, 24.

[210] P. Mwangi, 'Lawyers too have a case to answer', *Daily Nation,* 9 February 2019, 22; W. Menya, 'Fight to control JSC linked to Maraga succession intrigues', *Sunday Nation,* 9 December 2018, 24; P. Mwangi, 'How to break cartels in legal profession', *Daily Nation*, 16 February 2019, 24; P. Mwangi, 'Lawyers set integrity as the gold standard', *Daily Nation,* 18 March 2020, 24.

Besides the challenge of internal corruption, LSK also struggled to articulate a clear organisational position on corruption, the biggest challenge to rule of law in Kenya. This was not just technically within the country's jurisprudence, but also within the conduct of its own membership. The organisation not only witnessed one of its former chairpersons get roped into accusations of having fraudulently sold land to government, but also engaged in vigorous self-serving campaigns aimed at protecting some of its members charged with corruption.[211]

The organisation's position on corruption as articulated by its President Nelson Havi amounted to the argument that corruption was a problem that the legal profession could not end. Havi cited three factors which made corruption a scourge beyond LSK's ability to contain. First, those involved in the vice sought public office, which shielded them from accountability. Relatedly, government appointed people involved in corruption into public office. Thirdly, the general public largely supported corrupt individuals as manifested in the election of individuals accused of the vice. In all scenarios, the only role for the bar was to represent anyone accused of corruption. As such, the bar could not end the vice, even if it was committed to the tenets of good governance and public accountability.[212] Besides, the organisation seemed to revert to its history of strategic silences when it was confronted with the ICC question, arguably the biggest rule of law dilemma in the country in the 2010s. It failed to build on the earlier individual initiative by lawyers Maina Kiai and George Kegoro, whose work in influencing the adoption of the Rome Statute in the country's 2010 constitution had made it possible for ICC to intervene in Kenya.[213]

There also emerged serious cases of conflict of interest and violation of the principle of separation of powers involving LSK members who served as state officials but also retained their private practices, offering services to private clients. This was especially so for those lawyers who served in parliament and the JSC. The conflict of interest arose when the private clients the lawyers served faced scrutiny by the state agencies in which the lawyers served as state officials.[214] Examples of such conflict of interest were manifested in cases involving James Orengo, a Senator who doubled up as the lawyer for Governors Evans Kidero and Sospeter Ojaamong, both of whom were under scrutiny for suspected embezzlement of public

[211] B. Mugolla, 'Blow to lords of impunity in Judiciary', *Daily Nation*, 17 December 2019, 11; J. Wangui, 'Malili Ranch scam: High Court halts Eric Mutua prosecution', *Daily Nation*, 13 February 2020, 10; P. Mwangi, 'No way out for Bar and Bench without honest introspection', *Daily Nation,* 18 March 2020, 24.
[212] Wasuna, 'Havi'.
[213] Sihanya, Interview.
[214] B. Mugolla, 'Blow to lords of impunity in Judiciary', *Daily Nation,* 17 December 2019, 11.

funds. This was also the case with senators Kipchumba Murkomen and Mutula Kilonzo Jr, who doubled up as lawyers for Governor Mike Sonko[215] in a case of fraud.[216] Former LSK chairman Ahmednassir Abdullahi faced similar charges of conflict of interest for serving as a member of the JSC which provided oversight over judicial staff, but also represented private clients in cases which were brought before the very same judicial staff.[217]

A similar case of conflict of interest emerged when Havi issued a statement meant to serve his private clients, but which was passed off as the LSK position, thus compromising the institution's stand on matters of public interest. The case involved the conviction for corruption of MP John Waluke and Grace Wakhungu. The two convicts were served by Havi in his capacity as defence lawyer. Upon conviction of the two, however, Havi used his position as LSK President to denounce the conviction.[218]

On a positive note, the LSK engaged in a number of endeavours aimed at internal reforms focusing on some of the challenges which the organisation faced. The organisation was conscious of the challenges, as highlighted by contestants during campaigns for the LSK leadership in late 2019. Perhaps the most critical of the challenges was the long-running political and ethnic divisions within the LSK, which the contestants pledged to address.[219]

An equally important area of reform was maintaining discipline among members of the LSK, which was undertaken by the organisation's disciplinary tribunal. The tribunal remained active, striking as many as 20 lawyers from the roll of advocates between 2017 and 2019 for various cases of misconduct, including colluding to steal from insurance companies, overcharging, inadequate representation in court and failure to appear in court. It also set up a website through which the public could trace the disciplinary status of a lawyer before engaging them.[220] Another area of reform under Havi involved linking the existing LSK council to Senior Counsel who may have served in the previous councils of the LSK through

[215] The Senate oversees the activities of the county governments, which the three suspects were heading.
[216] A. Wako, 'LSK defends senators Mutula, Murkomen for representing Sonko in court', *Daily Nation*, 15 December 2019, 9.
[217] P. Gichana, 'Legal services amid oversight paradoxical', *Daily Nation,* 1 January 2020, 5.
[218] H. Kimuyu, 'LSK president sides with convict Waluke', *Nairobi News,* 26 June 2020, 4.
[219] E. Kwamboka, 'LSK hopefuls share their promises as D-day nears', *The Standard,* 12 January 2020, 7; N. Musau, 'LSK seeks to redeem its bite as lawyers head to key elections', *Sunday Standard*, 18 February 2018, 9.
[220] Cox and Ojienda, 'Ethics'; 'Improving professional ethics', *The Advocate,*1, No. 1. August 2014, 15; I.W. Gathirwa, 2015 *The Evaluation of Legal and Institutional Framework for Advocate Disciplinary Process in Kenya under the New Constitution 2010,* MA Thesis, University of Nairobi, 36; A. Ochieng, 'How lawyers collude to steal from insurance companies', *Daily Nation,* 28 February 2020, 9; J. Wangui, '20 lawyers removed from roll of advocates since 2017', *Daily Nation*, 16 May 2019, 6; *Code of Conduct and Ethics for Advocates,* The Law Society of Kenya (Nairobi: The Law Society of Kenya, 2016).

regular meetings. The purpose for the linkage was to have the current council learn from the experience of the Senior Counsel, with the hope that this would translate to a better mentored and historically grounded council.[221]

Other areas of reform were more operational and included mandating the LSK to issue practicing certificates rather than have this done by the registrar of courts, reformulating guidelines for LSK operations, including penalties for members who delay remittance of their membership subscriptions and reforming the process of conferring the title of senior counsel to move it away from confinement to lawyers who had served as LSK chairpersons.[222] A final area of reform focused on the emerging digital technology and on the need to have the organisation switch to technology in operations as a way of keeping up with changing times.[223]

The internal reform efforts were further boosted by the election of Nelson Havi as LSK President in early 2020. The election of Havi was hailed as heralding a 'brave new bar,' which would seek 'to regain LSK's lost glory, monitor legislation and lead from the front in public interest litigation and the promotion of the rule of law.'[224] Under Havi, the LSK was expected to confront the Uhuru administration for the emerging excesses against the rule of law. The new team was also expected to address standards of legal training, tighten entry into the Kenyan legal system in line with East African standards, strengthen the disciplinary tribunal and generally address the welfare of lawyers.[225]

However, Havi's tenure not only ended prematurely when he left in late 2021 to join active politics but was also characterised by further internal divisions within the LSK. His leadership seemed to elicit strong divisions, not just within the LSK, but also among senior

[221] Havi Nelson (@NelsonHavi). 'Read this letter from Dr. Kamau Kuria SC', *Twitter*, 13 November 2020, 5.08pm, https://twitter.com/NelsonHavi.
[222] E. Ndunda and W. Oketch, 'Elections: Aspirants vow more LSK power', *The Standard*, 20 January 2020, 9; E. Kwamboka, 'Young and old lawyers differ in debate on new LSK regulations', *The Sunday Standard*, 16 September 2018, 12; W. Menya, 'No senior counsel honour for Karua, Kalonzo as LSK calls for review', *Daily Nation*, 14 May 2020, 12; P. Langat, 'Uhuru names Karua, Kalonzo and Murgor among 24 senior counsels', *Daily Nation,* 20 July 2020, 8; V. Raballa, 'Key issues for 4 candidates eyeing LSK presidency', *Daily Nation*, 25 January 2020, 5.
[223] S. Memba, 'Tech verdict: Lawyers, go digital or perish', *Daily Nation*, 10 March 2020, 9; J. Wangui, 'Lawyers demand return to manual land transfers over e-system failures', *Daily Nation*, 24 June 2021, 6.
[224] W. Menya, 'Expectations high as lawyers pick new LSK leaders', *Daily Nation,* 26 February 2020, 4; A. Ochieng, 'In-tray full as Nelson Havi takes helm at LSK', *Daily Nation*, 28 February 2020, 4; W. Menya, 'LSK hopes to restore image as it picks new team Thursday', *Sunday Nation,* 23 February 2020, 7.
[225] N. Gisesa, 'LSK election: Landslide win for Nelson Havi as rivals concede', *Daily Nation*, 27 February 2020, 4; N. Sumba, '"Brave New Bar" team stands a good chance to transform LSK,' *Daily Nation,* 4 March 2020, 3; Wasuna, 'Havi'.

lawyers who had served in senior positions at the LSK. Among senior lawyers who supported him were Gibson Kamau Kuria, Ahmednassir Abdullahi and Tom Ojienda, while those opposed to him included Philip Murgor, Martha Karua and Fred Ojiambo, with Murgor dismissing his leadership as 'a complete and utter mess.'[226] Within the LSK, Havi was involved in a wrangle with both the LSK Chief Executive Officer and sections of the LSK council, leading to the latter making attempts to dismiss him before the end of his tenure. Incidentally, it was President Uhuru Kenyatta who rescued Havi's presidency when he rejected a LSK nominee to the IEBC recruiting panel proposed by the anti-Havi faction in the council, and accepted Havi's proposition.[227]

6.6 Summary

The ascendancy to power of the Uhuru administration coincided with constitutional change in the country. A significant focus of the change was restraining executive power by not only expanding and strengthening the checks and balances infrastructure in the country's governance, but also providing new constitutional obligations which the executive was expected to comply with. The administration responded to the changes by not only ignoring most of the constitutional rules it was uncomfortable with, but also attempting to directly control most of the new checks and balances institutions.

On the other hand, the administration's relationship with vertical accountability actors was characterised by a mixture of friendly relations and hostility. Friendly relations were mostly directed towards the Faith-based entities, with the administration avoiding any notable

[226] A. Chepkoech, 'LSK offices turned into battleground as boardroom war rages', *Sunday Nation,* 25 October 2020, 5; J. Wangui and S. Apollo, 'Wambua ouster splits LSK as Havi, council pull apart', *Daily Nation,* 21 October 2020, 12; Alfan, 'Ahmednasir'; N. Agutu, 'Havi, Karua engage in Twitter spat over LSK chief post', *The Star*, 11 November 2020, 9.

[227] J. Wangui, 'Court moves to stop LSK wrangles', *Daily Nation,* 24 August 2021, 6; B. Wasuna, 'Lawyers almost come to blows at heated meeting', *Daily Nation,* 19 January 2021, 2; S. Kiplagat, 'LSK council suspends Nelson Havi over failed leadership', *Daily Nation,* 8 February 2021, 6; A. Wako, 'Nelson Havi signals exit from LSK', *Daily Nation,* 7 September 2021, 4; B. Njeru, 'Standoff at LSK offices as Havi, Wambua teams clash', *The Standard,* 10 August 2021, 4; S. Otieno, 'Police arrest LSK President Nelson Havi', *Daily Nation,* 13 July 2021, 3; J. Ochieng', 'LSK woes: 38 staff petition council over delayed salaries', *Daily Nation,* 12 February 2021, 6; W. Menya, 'LSK wrangles hand State headstart in selection of Chief Justice', *Sunday Nation,* 21 February 2021, 8; M. Chepkwony, 'Rot at LSK laid bare as row on staff pay spills', *The Standard,* 5 January 2021, 7; B. Wasuna, 'Trouble brewing at LSK over Sh186m tax bill', *Daily Nation,* 13 January 2021, 9; S. Cece, 'Lawyers sue Havi, LSK council in fight against SGM resolutions', *Daily Nation,* 25 January 2021, 8; N. Gisesa, 'Intrigue at LSK as chief executive is shown the door', *Daily Nation,* 22 September 2020, 9; J. Ochieng', 'LSK CEO Mercy Wambua fights off plot to oust her', *Daily Nation,* 28 June 2020, 8; W. Menya, 'LSK sends CEO Mercy Wambua on leave, removes 8 council members', *Daily Nation,* 26 June 2021, 9; S. Otieno, 'Nelson Havi exits LSK as branch chairs take over council', *Daily Nation,* 13 January 2022, 12; W. Owino, 'Why Linda Kiome took charge of LSK before expiry of Nelson Havi's term', *The Standard,* 13 January 2022, 11; Francis Mureithi, 'Three to battle for LSK presidency as Havi eyes political office', *Daily Nation,* 10 January 2022, 5.

confrontations with these entities throughout most of its time in power. Hostility, on the other hand, was especially directed towards sections of the independent media, labour unions, particularly the KNUT and CSOs involved in campaigns for good governance.

The attempt to control the checks and balances institutions and refusal to implement constitutional provisions inevitably led the administration into confrontation with the judiciary. More than any other institution, the judiciary not only fought off attempts by the administration to put it under executive control, but it also made the administration uncomfortable by regularly issuing rulings which promoted constitutionalism and countermanded the administration's stand. In response, the administration instituted a number of hostile measures against the judiciary with the aim of weakening the institution.

The conflict between the judiciary and the executive, as well as the refusal by the Uhuru administration to follow most of the laid down constitutional provisions, drew the LSK into the struggle, responding to the administration. LSK's response focused on three priority areas, namely constitutionalism, judicial independence and the fight against impunity. The response itself started off in the early years of the administration's tenure when the LSK was led first by Eric Mutua and later by Isaac Okero, but declined under the leadership of Allen Gichuhi, only to re-emerge more robustly under Nelson Havi.

The administration reacted to the demands the LSK placed on it by exploiting the long-standing internal political and ethnic divisions which commenced during the Kibaki-era. This helped it to split the organisation into two factions, which made LSK unable to speak with an authoritative voice. Additionally, the administration was reportedly involved in influencing the election of Allen Gichuhi as LSK President. Gichuhi was thought to come from a section of the organisation which was sympathetic to the administration. His tenure was marked largely by silence on the part of the LSK even in light of the challenges the administration posed to judicial independence and constitutionalism. The administration's anti-LSK efforts were worsened by internal weaknesses in the LSK itself. Besides political and ethnic divisions, the organisation also faced issues of emerging high-level corruption among prominent members as well as the use of important institutions by some of the members to stall efforts at fighting corruption.

Nevertheless, the organisation attempted some internal reform, heralded particularly by the election in late 2019 of Nelson Havi, who inspired expectations of positive changes at the

organisation. The huge margin of victory which Havi garnered seemed to indicate a broader but rare consensus among the LSK membership and therefore signal an end to the long-standing political and ethnic divisions which had bedevilled the organisation and made it unable to build such broad consensus. Havi's tenure, however, came to be characterised by leadership wrangles which pitted him against the head of the LSK Secretariat and sections of the LSK council. As such, it failed to meet the high expectations of reforming and returning the LSK to the pedestal of an effective vertical accountability institution, which it had occupied in some of its earlier years. The overall emerging picture was that of a LSK which was working to regain relevance in the fight for good governance in the country. Although it engaged in numerous actions aimed at restraining the Uhuru administration from excesses, the efforts were highly fragile and the organisation was highly susceptible to weaknesses which made it unable to be an effective public watchdog.

CHAPTER SEVEN

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

7.1 Summary

The general objective of this study was to examine efforts made by the LSK to restrain the Kenyan state from excesses since the organisation's establishment in early 1920s. The specific objectives were to examine:

i. The emergence of the LSK and its interaction with the colonial administration up to 1963.

ii. The relationship between the LSK and the Jomo Kenyatta government.

iii. The interaction between the LSK and the Moi administration.

iv. The evolution of the LSK in the post-Moi era up to 2022.

This chapter provides the conclusion to the study by revisiting each of the objectives. It also draws recommendations based on the conclusion reached for each of the objectives.

7.2 Conclusions

7.2.1 The Emergence of the LSK and its Interaction with the Colonial Administration up to 1963

The colonial government functioned for a significant period without following any rule of law principles, whether this was in the form of supremacy of the law, existence of checks and balances or respect for due process. As summarised in Figure 1 below, although colonialism effectively began in 1886, it was not until 1954 that the colonial administration commenced efforts towards establishing a constitution for the country.

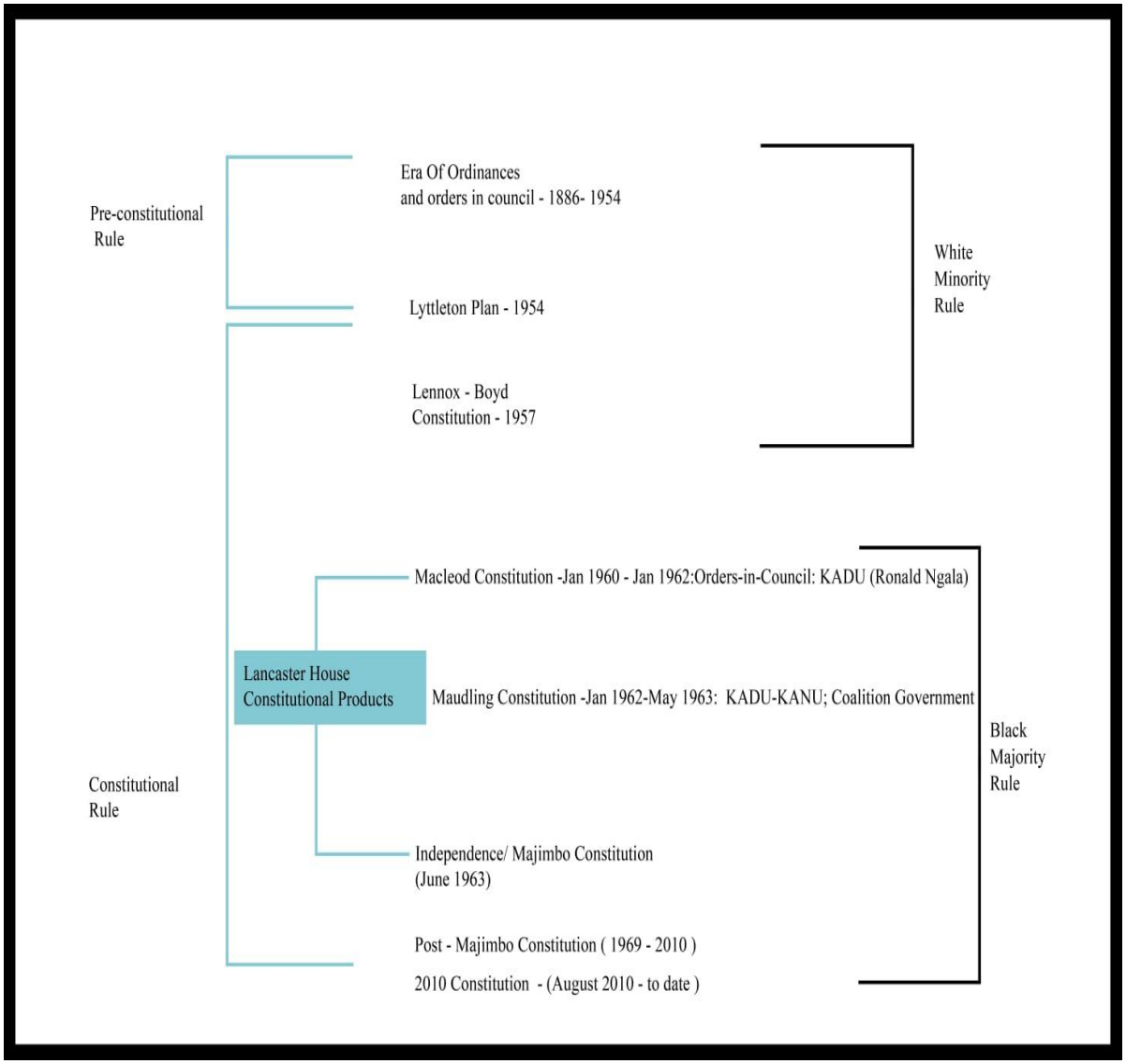

Figure 1: Evolution of State Restraint: Kenya's Constitutional Journey

Source: Author's own formulation based on various sources.

It was only towards the end of colonial rule that attempts were made to establish a strong rule of law culture in which supremacy of the law, checks and balances and due process would be promoted. However, due to the rushed nature of constitutional development and pressures from African nationalist political movements agitating for decolonisation, the experiment at using the constitution to entrench the rule of law was not successful. The LSK emerged within this context of limited adherence to the rule of law by the colonial administration. Figure 2 below provides the genealogy of the organisation, tracing its origins to the very beginning of the twentieth century.

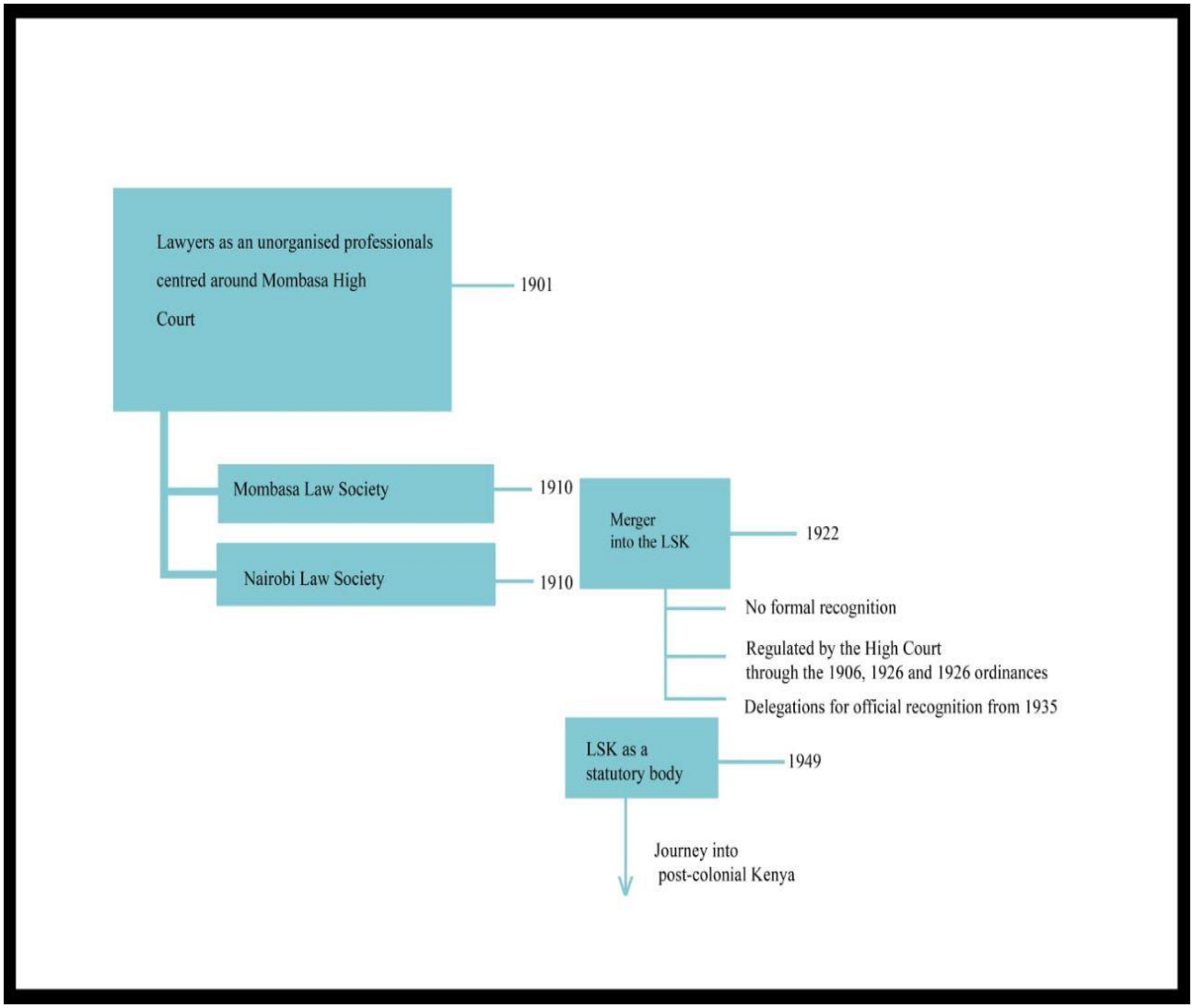

Figure 2: The Origin and Evolution of the Law Society of Kenya, 1901–2022

Source: Author's own formulation based on various sources.

However, the organisation did little to promote the rule of law and restrain the state, especially with regard to the rights and freedoms of the indigenous African population. Like the colonial-era judiciary and the LegCo, the LSK paid scant attention to questions of the rule of law and state restraint in relation to African rights and freedoms. It thereby acquired an identity of bystander in questions of respect for the rule of law under colonial rule.

7.2.2 The Relationship between the LSK and the Jomo Government

The Jomo government inherited an expanding state restraint terrain as indicated in Figure 3 below. The terrain had commenced a journey towards significant growth with the reform of the state which had begun with the constitutional reforms of 1954.

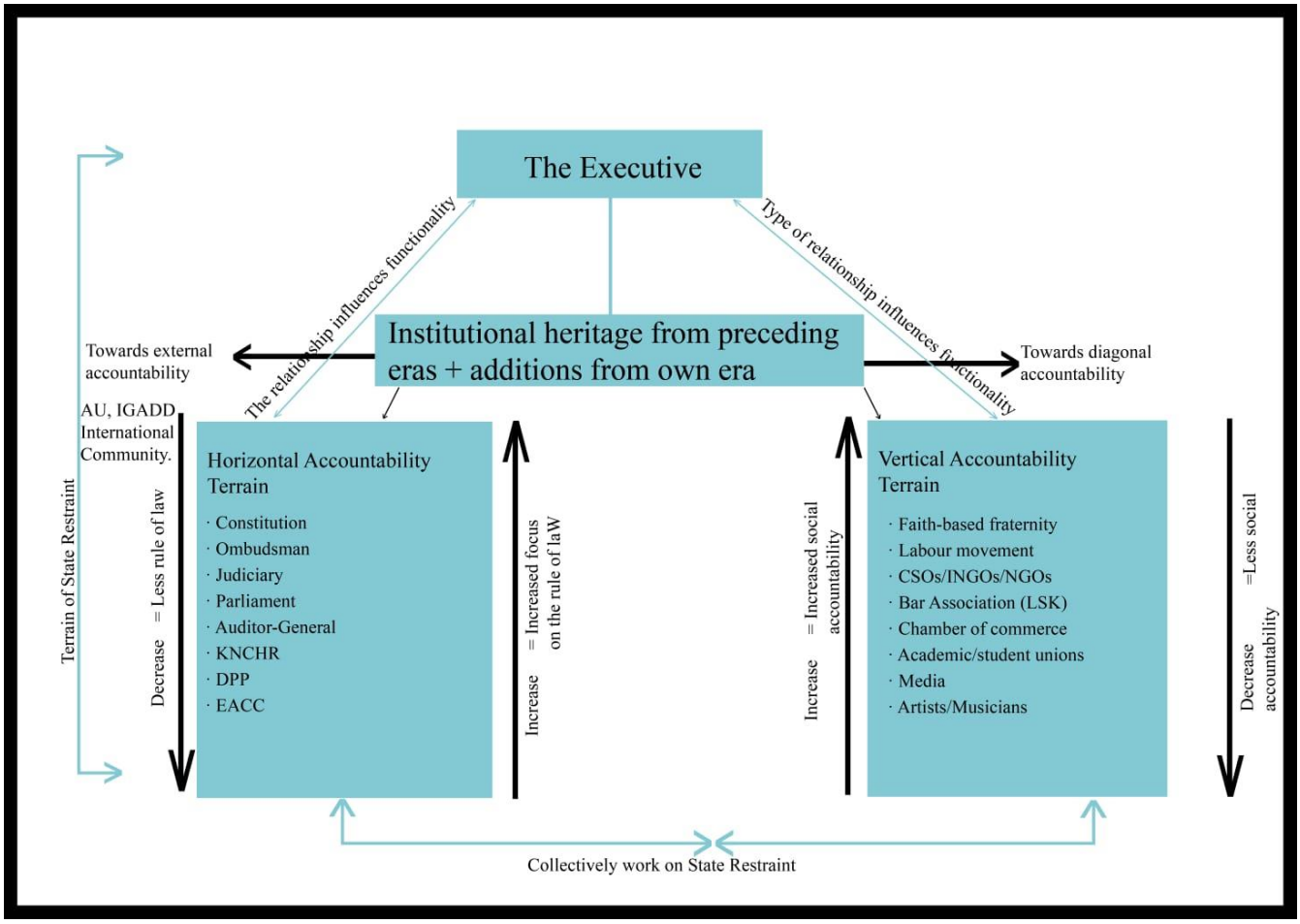

Figure 3: State Restraint in Kenya from around 1954

Source: Author's own formulation based on various sources.

However, there were at least three significant weaknesses within the emerging state restraint terrain, each affecting key pillars of the rule of law. First, even with a constitution in place, the idea of constitutional rule remained fragile at the dawn of independence. This was largely because constitutional rule had been introduced late in the country's governance and also because the constitution itself was still subject to significant disputes among different African interest groups. Secondly, the two main checks and balances institutions, the judiciary and legislature, were still undergoing reforms to overcome the legacy of having excluded Africans during much of the colonial period. Thirdly, although there were at least three vertical accountability actors, namely the Church, the labour movement, and the media, these institutions had largely supported the nationalist course for independence and were therefore prone to co-optation by the Jomo administration. In addition, the Jomo administration worked consciously to reshape the terrain to enhance its own power and reduce the terrain's capability to restrain it from excesses. Nevertheless, at least one institution within the terrain,

namely the Church retained the capacity to restrain the administration. This was witnessed in 1969 when the Church mobilised against the administration for subjecting members of the Kikuyu community to an oath in the aftermath of the assassination of Tom Mboya.

Within the context provided by the Jomo administration, the LSK was unable to provide any significant restraint on the administration. This was mainly due to factors which can be categorised as internal and external. Internally, the organisation was dominated by non-indigenous groups, and like the colonial-era judiciary and legislature, had to adjust itself to accommodate African interests at the dawn of independence. Externally, the Jomo administration placed the organisation under the direct control of a powerful government functionary, the AG Charles Njonjo. Using regulatory processes, the administration controlled the institution and rendered it incapable of emerging as an effective restraint on the state. It was only towards the end of the administration's tenure, and particularly after the shift in control of the institution from non-indigenous to indigenous lawyers, that the institution began to show great promise as an actor in state restraint. As such, the LSK retained the identity of an inconsistent defender of the rule of law during much of the Jomo era.

7.2.3 The interaction between the LSK and the Moi administration.

The Moi administration inherited a state restraint terrain evolving towards what is described in Figure 3 above. The terrain had undergone significant suppression under the preceeding Jomo administration and was thus in a state of vulnerability. Like its predecessor, the Moi administration reshaped the terrain to accommodate its accumulation and centralisation of power in the President. It deepened the suppression of the terrain by introducing extreme measures, two of which included outrightly outlawing the political opposition and torturing perceived political opponents thrown into detention.

However, unlike the Jomo administration, the Moi administration had to contend with three emergent realities. First, there was a re-emergence of at least one checks and balances institution, the political opposition, which the Jomo administration had effectively muzzled. Secondly, the administration had to contend with the emergence of external accountability as a major feature in the country's evolving state restraint terrain. Thirdly, within the vertical accountability terrain, the Moi administration had to contend with not just the resurgence of the three vertical accountability actors, the Church, the media and the labour movement

which the Jomo administration had largely silenced, but also with a proliferation of actors who demanded for the administration's accountability.

The LSK was one of the resurgent vertical accountability actors under the Moi administration. Although the organisation was co-opted in the early years of the administration, it soon broke off the co-optation and challenged the administration on a number of occasions. There were two main factors which facilitated this transformation. First, the organisation had become more coherent internally, having overcome the earlier internal division caused by racial divisions amongst its membership. Externally, the Moi administration engaged in numerous violations of the rule of law which were impossible to ignore. Although the administration attempted to curtail LSK's ability to restrain it by enacting hostile regulations against its operations and co-opting sections of its leadership, the organisation overcame these measures and became one of the most visible vertical accountability actors during the era of the administration. So radical was the LSK in its opposition to the Moi administration that it joined the political opposition and together, ousted the administration from power in late 2002.

7.3.4 The Evolution of the LSK in the Post-Moi Era up to 2022

The emergence of the third postcolonial administration led by Mwai Kibaki of the National Rainbow Coalition (NARC) party was partly as a result of the resurgence of the state restraint terrain under the Moi administration. The resurgence not only saw an end to the Moi administration, but it also ushered in a post-KANU era that was to be marked by significant developments in Kenya's state restraint terrain. In the immediate aftermath of the KANU era, the NARC administration engaged in reinstatement of some of the state restraint agencies which had been either weakened or destroyed during the KANU era. Among the most critical initiatives in this regard included a clean-up of the judiciary through a so-called 'radical surgery' and setting up of commissions of inquiry into state excesses of the previous era. These reforms were momentarily disrupted by a fall out in the ruling NARC party, leading to a disputed election of 2007 and the resultant post-election crisis. The crisis led to more comprehensive reform of the country's governance, resulting in the adoption of a new constitution in August 2010. The new constitution extensively redefined, expanded and reconfigured the state restraint terrain. In doing so, it drew co-operation from most sections of society, including the LSK.

The post-KANU era evolved further with the ascendancy to power of the Uhuru Kenyatta administration. The administration's ascent to power having coincided with the constitutional reforms ignited by the 2010 constitution, its reaction to the reforms consisted of two stances. First, it cherry-picked constitutional provisions, implementing those it was comfortable with, while ignoring those it felt uncomfortable with. Secondly, it attempted to amend the constitution to reverse some of the changes the constitution had instituted, including those within the state restraint terrain. This led to open confrontations between the administration and sections of agencies from the state restraint terrain, most notably the judiciary.

The post-KANU era brought significant changes to the LSK, as it did for other agencies in the state restraint terrain. The organisation's relationship with the post-KANU administrations evolved into three stances. These revolved around co-optation, co-operation and confrontation. Co-optation was mostly witnessed in the immediate aftermath of the KANU era, ignited by the appointment of key personalities linked to the LSK into influential government positions. It was also manifested later under the Uhuru Kenyatta administration when the administration cultivated closer links with one of the LSK's post-KANU era leaders.

Co-operation was mainly manifested towards the end of the Kibaki administration during the constitution review process and in its immediate aftermath, although it could be traced as far back as in the immediate post-KANU era when the organisation supported most reform initiatives of the immediate post-KANU government. On the other hand, confrontation was mostly witnessed late in the Uhuru administration, although traces of it had manifested themselves in short episodes under the Kibaki government. The confrontation was mostly triggered by disagreements between the LSK and government over questions of constitutionalism, reconstitution of critical checks and balances institutions, judicial independence and the fight against impunity.

The three stances of co-optation, co-operation and confrontation brought to the fore at least three critical insights on the LSK. First, government ceased being a major factor in directly influencing the LSK. Unlike the KANU-era administrations, the post-KANU administrations could not institute hostile measures against the LSK to curtail the organisation's capacity to restrain them. Secondly, internal factors became decisive in determining which stance LSK took towards government. One such internal factor was the ethnic and political affiliation of the organisation's leadership. The organisation often adopted either a confrontational stance

or was co-opted by government depending largely on the ethnic and political affiliation of its leadership at any given time.

Thirdly, the three stances further consolidated the identity of the LSK as an inconsistent defender of the rule of law. Whereas in instances of confrontation and co-operation the organisation could be said to have been defending and promoting the rule of law respectively, in instances of co-optation, this was not the case. Indeed, it was during the phases of co-optation that the organisation neglected some of the most significant rule of law issues in the country's post-KANU history, a case in point being the International Criminal Court (ICC) cases, over which the organisation failed to pronounce itself.

7.3.5 Continuity and Change in State Restraint in Kenya and the Role of the LSK, 1920–2022

Overall, the government in Kenya, both in the colonial and postcolonial eras, consistently exhibited hostility towards any form of restraint to its power. As Figure 4 below demonstrates, this was consistent, whether the restraint came from horizontal accountability mechanisms or vertical accountability. Government only took rule of law seriously when faced with a crisis, for instance in the aftermath of the Mau Mau rebellion in 1954 and the post-election crisis of 2007. As a result, this made the country's state restraint terrain significantly fragile.

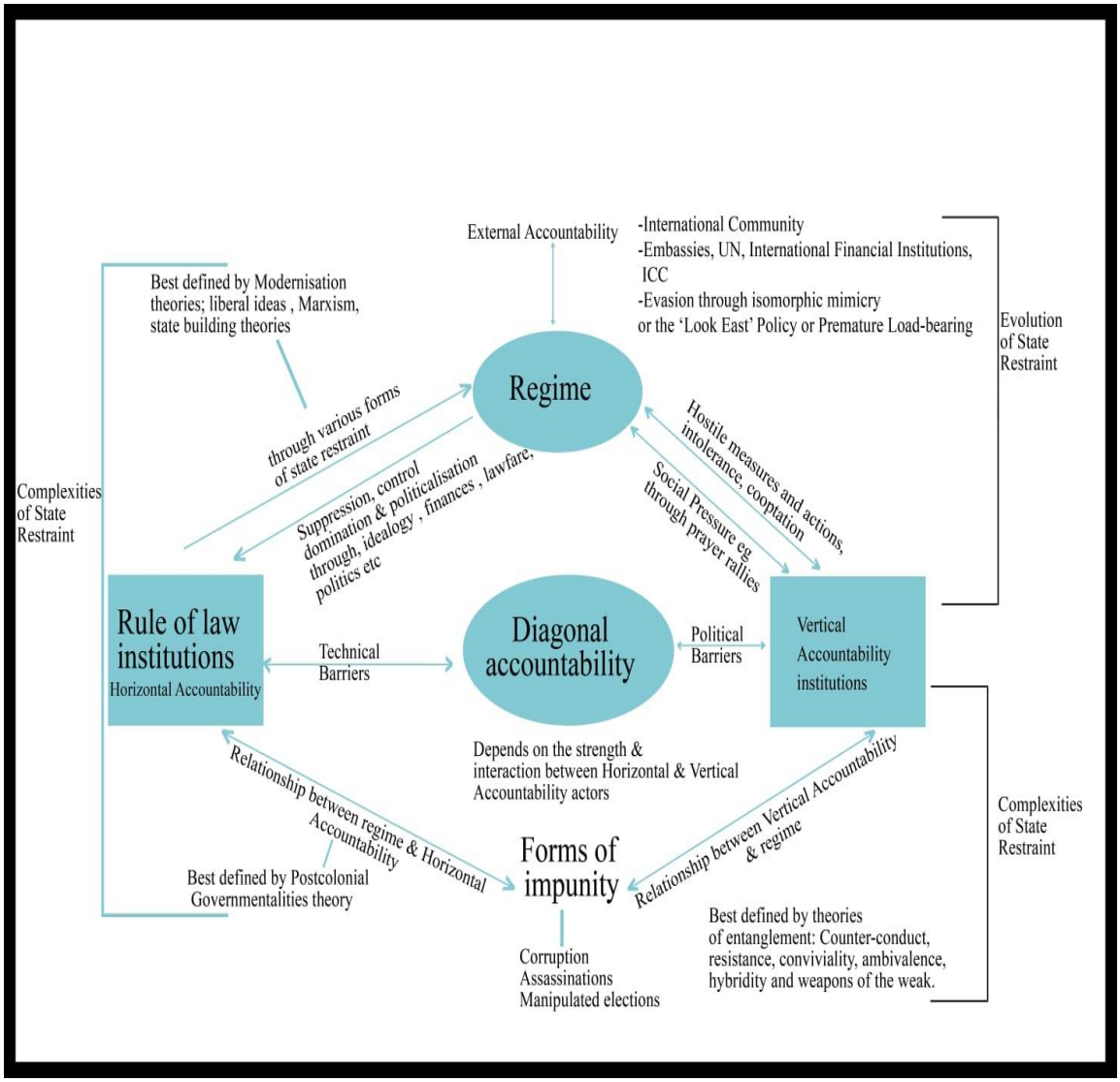

Figure 4: Government Influence on the State Restraint Terrain in Kenya since 1922

Source: Author's own formulation based on various sources.

A major reason for an administration's actions against state restraint is due to its main incentives while it is in power. Incentives include such tendencies as the need to protect the white minority population at the end of the colonial period, the need to remain in power perpetually or the need to extend one's term in office. The incentive then defines an administration's attitude and actions towards the state restraint terrain, providing the main motivation for the conduct of the administration towards state restraint institutions. Figure 5 below links an administration's incentives to its relationship with the state restraint terrain.

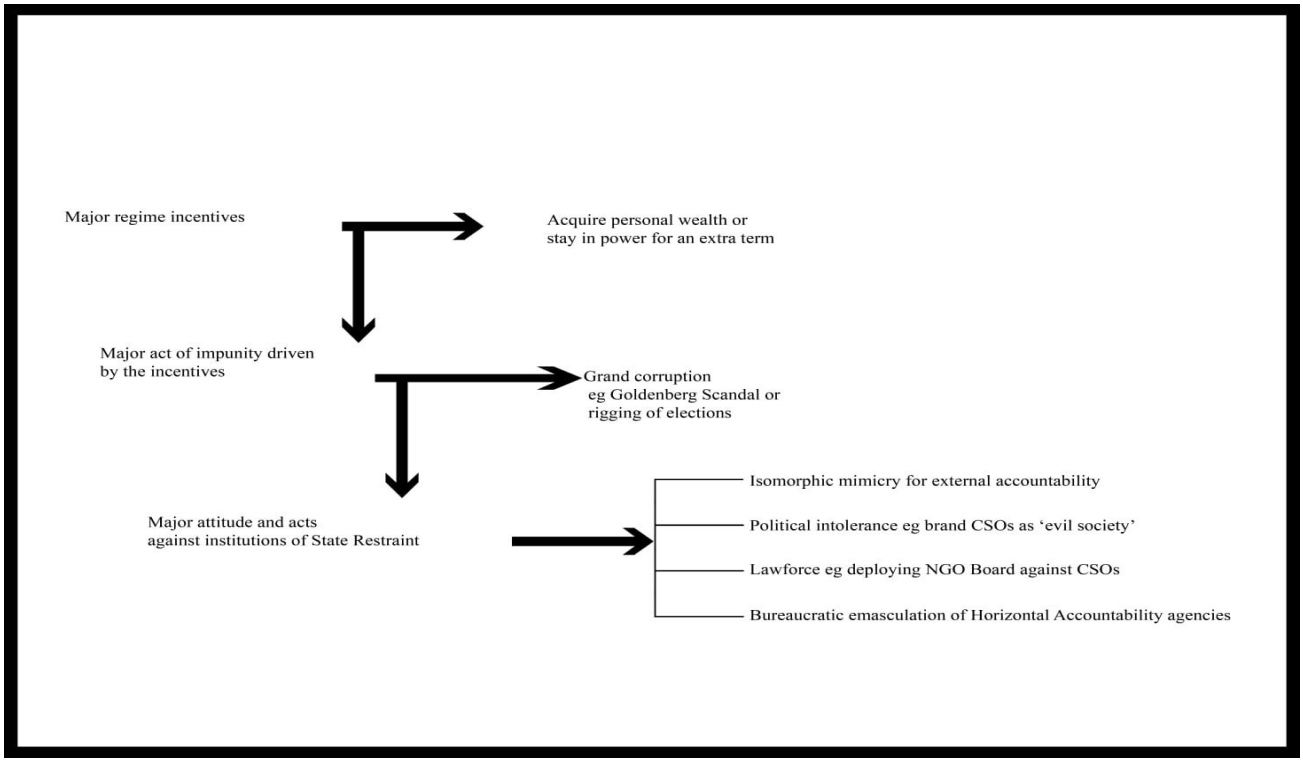

Figure 5: Regime Incentives and their Influence on State Restraint

Source: Author's own formulation based on various sources.

The absence of state restraint inevitably led to two main forms of impunity, namely mega corruption linked to public officials and extra-judicial executions linked to security organs. Figure 6 below explores the relationship between the administration, the state restraint terrain and impunity. An administration's incentives determined the fate of the state restraint terrain, which in turn determined the nature of impunity that the administration came to be associated with. Nevertheless, societal pressure, conceived as vertical accountability, played a major role in restraining the five administrations from impunity. Although often suppressed and co-opted by the state and hampered by internal divisions arising from professional, ethnic, geographical, political and other differences among its various actors, vertical accountability often stepped in to restrain the state from excesses using different tactics and strategies suited to each actor. These tactics and strategies included deploying prayer rallies (faith-based entities), writing editorials (the media), mobilising industrial action (the labour movement), and litigation (the LSK) among others.

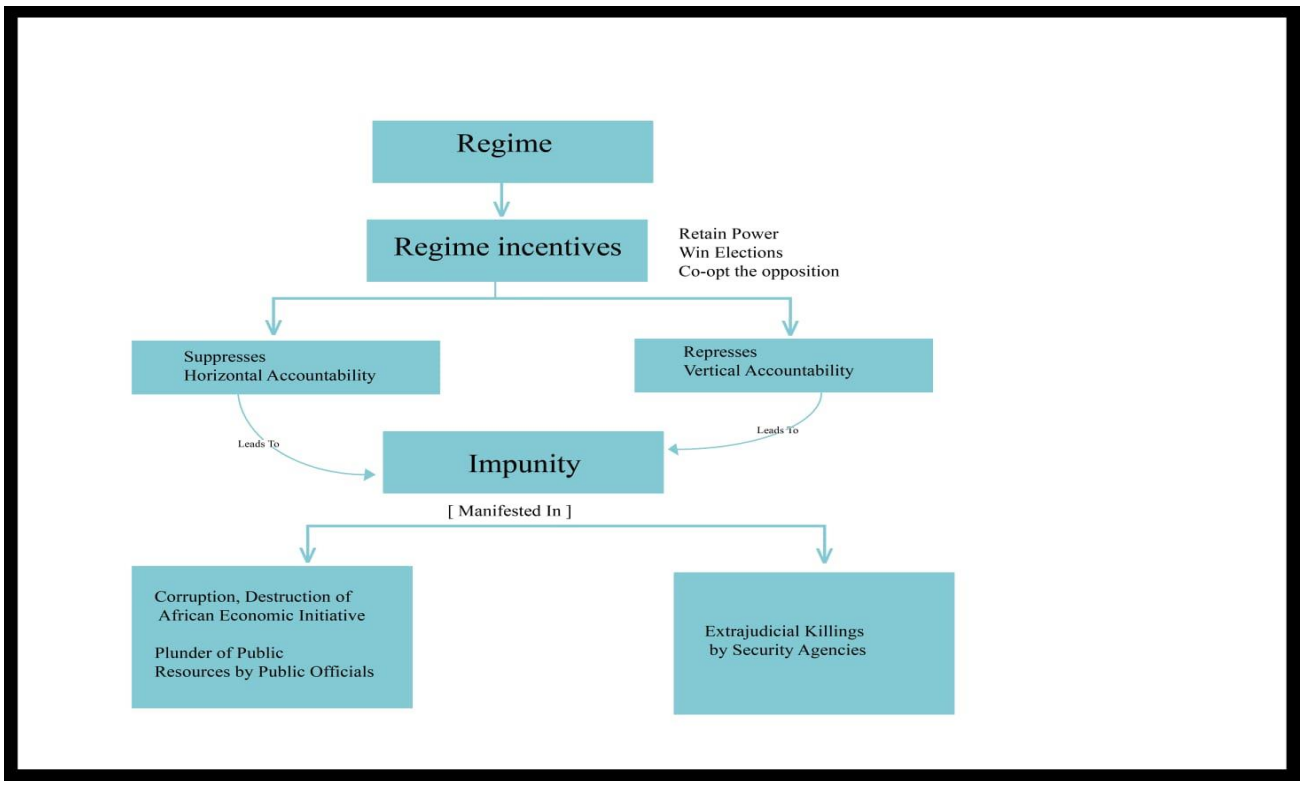

Figure 6: Regime Incentives and the Growth of Impunity

Source: Author's own formulation based on various sources.

Within the evolving culture of vertical accountability in the country, LSK was a major player. Being both a statutory body and a membership organisation, the LSK occupied a unique position within the state restraint terrain. It traversed both the horizontal accountability sphere as a statutory body, and the vertical accountability terrain as a membership body bringing together lawyers.

However, due to inconsistencies as a defender and promoter of the rule of law, the organisation acquired a dual identity in its role as an organ of state restraint. The first identity is that of a bystander in the face of state excesses. Under this identity, the LSK usually adopted silence in the face of state excesses. This was done for mainly three reasons. First, silence was adopted as a survival strategy in the face of hostile measures from government. Secondly, it was adopted due to internal factionalism brought about by racial, ethnic or political differences. Thirdly, silence was adopted as a result of co-optation of the leadership of the organisation by the government.

The identity of the LSK as a bystander was mostly at play during the colonial and Jomo administrations, although it was also witnessed in brief episodes in the life of the other three administrations. Internal factors such as racial, political and ethnic divisions were the reason for the LSK's indifferent bystander identity during the early Jomo administration, as well as brief episodes during the Kibaki and Uhuru Kenyatta eras. External factors such as suppression by the state, which was witnessed mostly during the Jomo and Moi Eras and co-optation by the state, which was mostly witnessed under the colonial administration, but also in brief episodes during the Moi, Kibaki and Uhuru eras were also responsible for LSK's bystander identity during these periods.

The second LSK identity was that of a campaigner for state restraint. Under this identity, the organisation was at the forefront of challenging excesses by the state, including instituting measures aimed at having the state stopping the excesses. This is the identity mostly witnessed during the Moi administration, and to a lesser extent, during the Kibaki and Uhuru administrations. The identity first emerged in the last years of the Jomo administration, was consolidated under the Moi administration, faded under the Kibaki administration, and re-emerged during the Uhuru administration.

The campaigner identity was promoted by internal factors such as unity and professional coherence as witnessed when the LSK overcame internal racial divisions towards the end of the Jomo administration in 1978. It was also spurred by external factors such as the constitutional changes of 2010, which boosted the LSK's role as a promoter of the rule of law. Notably, the campaigner identity has also thrived even with state suppression and co-optation, as was witnessed under the Moi administration.

7.3 Recommendations

The state in Kenya needs to change its attitude towards the rule of law to transform itself from a reluctant respecter of the rule of law. It needs to appreciate the centrality of the rule of law in the country's development and must uphold it as part of the integral functions of government. This would result in a mutually beneficial relationship with agencies of state restraint, leading to reduction in impunity and other forms of ills which have negatively affected the country's development.

On the other hand, LSK could overcome its inconsistent record as a defender and promoter of the rule of law if it works on both the internal and external factors which predispose its

towards inconsistency in carrying out its mandate of defending and promoting the rule of law. Internally, the organisation needs to promote professionalism amongst members and avoid factionalism. It should also articulate a value-system that defines what it is an organisation, committing it to issues of substantive justice for the most vulnerable groups in the country. It should also cultivate a culture of reflecting on its contribution to deepening the rule of law in the country through encouraging a multi-disciplinary study of its actions. Externally, the organisation should develop a system for managing relations with the state to avoid co-optation.

SOURCES

A. List of Informants

S. No.	Name of Informant	Category	Place of Interview	Date of Interview
1.	Amollo, O.	Former LSK council member and former CEO, Commission for Administrative Justice	Via Phone	20 October 2021
2.	Imanyara, G.**	Founder Editor, the Naitobi Law Monthly	Fatuma House, Hurlingham off Argwings-Kodhek road, Nairobi	19 April 2024
3.	Jebor, P.	Director, Youth Alive Kenya, Nairobi, CSO	Online meeting	10 December 2022
4.	Juma, M.	Programme Coordinator, Agile and Harmonised Assistance to Devolved Institutions (AHADI), CSO	Online meeting	12 December 2022
5.	Kariuki, M.*	Former LSK council member	Law Society of Kenya office, Off Gitanga Road, Nairobi, 12 August 2002	12 August 2002
6.	Karua, M.**	Former LSK council member and Justice Minister	Narc-Kenya offices off Lenana road, Nairobi	6 May 2024
7.	Kegoro, G.	Former LSK archivist	Kesh Kesh Restaurant, Hurlingham,	3 November 2021

			Nairobi	
8.	Kuria, G. K.***	Former LSK chairman	GK Kuria Law Offices & Chai House, Nairobi CBD	12 July, August 2002 and 10 April 2024
9.	Muite, P.**	Former LSK chairperson	Interview at Sifa Towers, off Lenana Road, Nairobi	25 January and 1 April 2024
10.	Murungi, K.*	Former LSK council member	Murungi and Kuria Advocates Law Office, Nairobi, 18 July 2002	Robert, M.
11.	Mutunga, W.**	Former LSK chairman and former Chief Justice	Via Phone	17 April 2024
12.	Mwendwa, J.	Son of the late Rev. Dr. David Gitari, Archbishop, ACK	Tamasha Restaurant, Hurlingham, Nairobi	30 March 2023
13.	Nowrojee, P.	Former LSK chairperson	Via Phone	4 November 2021
14.	Odumbe, M.	Monitoring and Evaluation director, Oxfam Africa, CSO	Online meeting	2 December 2022
15.	Oduor, C.	Programme Director, Kenya Human Rights Commission, CSO	Online meeting	16 January 2023
16.	Sihanya, B.	Legal scholar	M/S Prof Ben Sihanya & Co. Advocates,	24 October 2021

			2nd Floor at Chaka Place, Hurlingham, Nairobi	
17.	Suba, C.M.	Coordinator, Civil Society Reference Group, CSO	Via Phone	January 2023

* Interviewed by M. Robert

** Interviewed after the PhD Oral defence on 22 November 2023.

*** Interviewed at 3 different times by two different interviewers.

B. Archival Sources

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APPENDICES

Appendix I: Interview Schedule for Key Informants

Name………….

Age……**Gender**……

Occupation……**Place of residence**…….**Date of Interview**……

A sample of questions administered to key informants during data collection.

1. When and in what capacity did you serve the LSK?
2. During your tenure, what were some of the most significant challenges to the rule of law that were witnessed?
3. Was the Kenyan government involved in any excesses against the rule of law?
4. How did the LSK officially respond to these challenges?
5. Do you think the response that the LSK came up with against the excesses that negated the rule of law was appropriate?
6. What was the reaction of government to LSK's response against its actions?
7. Are there factors which hindered the LSK from effectively challenging the Kenya government when it violated the rule of law? If yes, what were these?
8. What are some of the significant benefits to the rule of law that have come out of the LSK challenging government from going against the rule of law?
9. Did the LSK operate alone or with other groups?

Appendix II: Interview Schedule for Other Informants

Name……..…….

Age……**Gender**……

Occupation……**Place of residence**……..**Date of Interview**……

A sample of questions administered to general informants during data collection.

1. In what ways have you interacted with the LSK?
2. In which period did this interaction take place?
3. Do you understand the mandate of the LSK?
4. Do you think the LSK has lived up to this mandate?
5. One specific mandate of the LSK is to promote the rule of law. Do you think the LSK has upheld the rule of law in relation to government actions?
6. Do you think there have been significant violations of the rule of law in Kenya by the government?
7. Did the LSK respond to these violations? If yes, in what ways? Do you think these were appropriate?
8. How did the government react to the LSK's actions against it?
9. What are some of the factors that you think have made the LSK struggle in its efforts to discharge its mandate, particularly with regard to restraining the government from excesses?

Appendix III: NACOSTE Research Permit

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Appendix IV: When Lawyers Shut Up: The Law Society of Kenya's Silence during the Colonial Era.

When Lawyers Shut Up: The Law Society of Kenya's Silence during the Colonial Era

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Abstract

This paper explores moments when the Law Society of Kenya (LSK) remained silent in the face of excesses of the colonial administration. The LSK is an important agent in restraining the Kenyan state from violations against the rule of law. Yet since its emergence in the 1920s as a premier lawyers' organisation, this has not always been the case. The organisation has had episodes of silence in the face of state violation of the rule of law. The paper conceptualizes the rule of law as implying checks and balances, existence of rules which apply to everyone and respect for due process, and silence as constituting LSK actions which were inadequate in countering given state excesses. It uses entanglement, sourced from the poststructuralist intellectual tradition, along with related concepts of ambivalence and hybridity as well as conviviality, as the conceptual framework to explain LSK's silence in the face of colonial government excesses. Further, the paper employs the ex post facto research design and uses available archival accounts as sources of primary data and books and journals for secondary data to establish what constituted the most egregious violations of the rule of law under colonial rule. It also identifies LSK's reaction to the violations, whether this was through pronouncements, actions or non-action. The paper also examines the dynamics which informed the organisation's reaction. It concludes by elaborating on the organisation's character as a result of the silence, challenging assumptions that it was a consistent defender of the rule of law in Kenya across time.

Keywords: Entanglement, rule of law, state excesses, silence

Appendix V: Lawyers and Vice in the Public Sphere: Exploring the Problem of Ethics amongst Legal Practitioners in Kenya

Lawyers and Vice in the Public Sphere: Exploring the Problem of Ethics amongst Legal Practitioners in Kenya

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Abstract

The Kenyan public sphere witnessed a surge in dominance by legal practitioners, especially with the commencement of the agitation for political reform in the early 1990s. The surge saw legal practitioners take on important roles in the public sphere, either as actors in key public institutions or opinion shapers in public discourses. However, the rise in dominance of the practitioners did not translate into improved ethics within the sphere. This paper explores factors which may have contributed to this situation. It does so in three main ways. First, it undertakes a brief review of literature on ethics in the legal profession. Secondly, it examines the study of ethics in the legal profession in order to provide working definitions for concepts such as law, rule of law, morality, ethics and moral relativism and to draw attention to important questions with regard to the philosophical and theoretical underpinnings of ethics and legal practice. Thirdly, the paper uses evidence mainly sourced from newspaper accounts to cite specific cases of legal practitioners engaging in activities which breach stated ethical codes, such as conflict of interest, not disclosing financial compensation and moral relativism. The paper draws out two main recommendations for improving ethics within the legal profession, especially in its interaction with the public sphere. First, it suggests that claims made by legal practitioners with regard to the rule of law be thoroughly interrogated from an ethical perspective to distinguish them from personal, political and commercial interests. Secondly, it proposes that legal training be grounded on a curriculum centred on ethics. This should produce legal practitioners with a broad view of ethical questions, which may not only help in understanding legal ethics, but also in promoting the same in the profession.

Introduction

Institutions in the public sphere are expected to uphold public interest, presumably demonstrated by having the institutions openly side with the general public in cases involving perceived public villains. However, for sections of the Law Society of Kenya (LSK) membership, this may not always be the case. Often, the membership takes the side of those who, in public opinion, are considered villains.[21] The membership cites a commitment to the rule of law as the main reason why it regularly goes against public opinion in siding with what are generally perceived as public villains. Adherence to the rule of law is presumed to be superior to public opinion, which can encourage anarchy.

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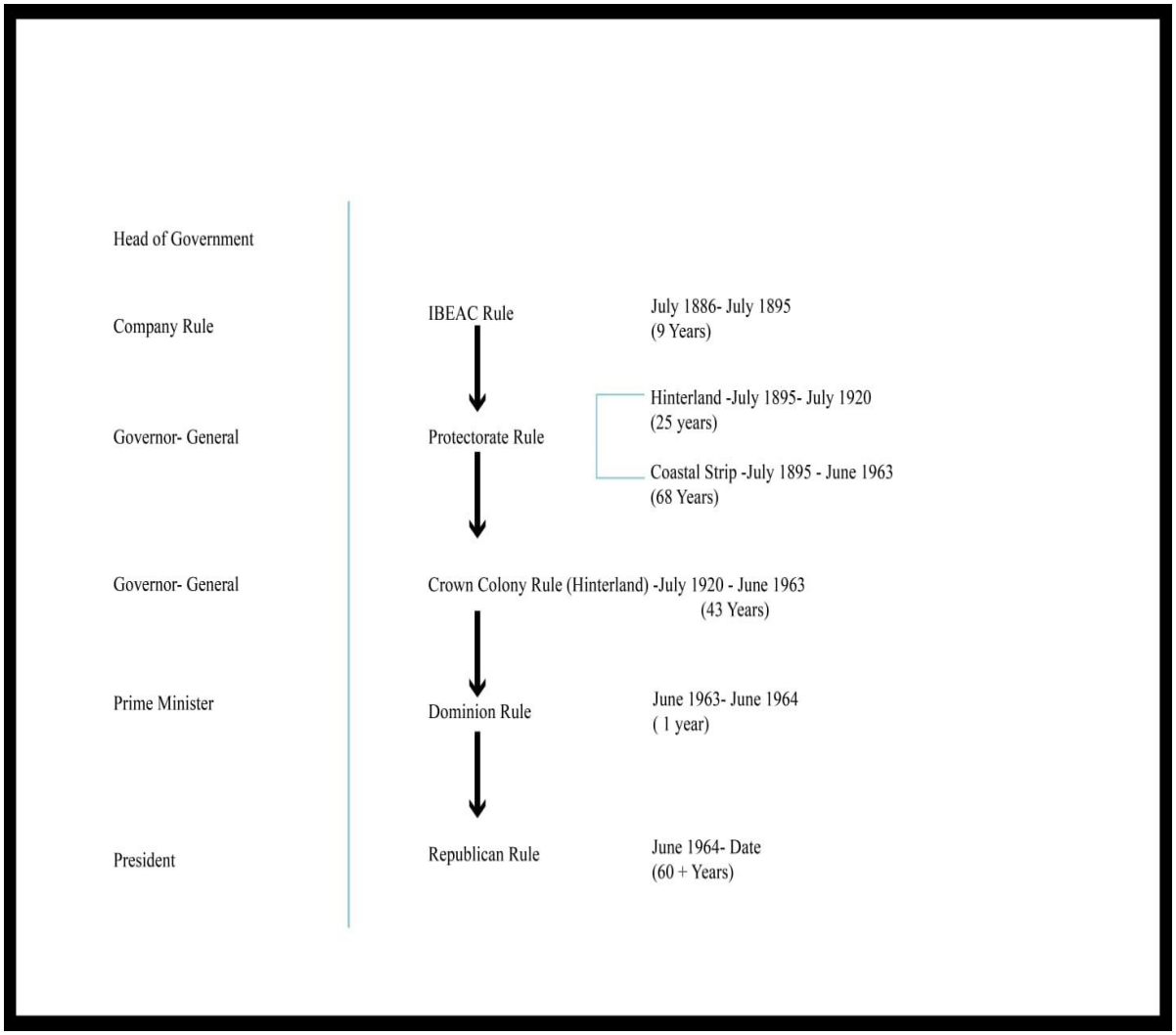
Appendix VI: Government Structure in Kenya, 1886–2022



Source: Author's own formulation based on various sources.